No. 13,130

IN THE

United States Court of Appeals

For the Ninth Circuit

UNITED STATES OF AMERICA,
Appellant,

vs.

R. STANLEY DOLLAR, DOLLAR STEAMSHIP LINE, a Corporation; THE ROBERT DOLLAR CO., a Corporation; H. M. LORBER,
Appellees.

Brief for Appellees R. Stanley Dollar, Dollar Steamship Line, The Robert Dollar Co. and H. M. Lorber

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1938, pursuant to a certain agreement of August 15, 1938, they transferred that stock to the United States Maritime Commission.

In November 1945 appellees, as plaintiffs, filed suit in the United States District Court for the District of Columbia against the then members of the Maritime Commission, asserting that they were the owners of that stock (*Dollar,* et al. v. *Land,* et al., No. 31468). The complaint alleged that the transfers of 1938 had been made solely as a pledge to secure a debt to the United States, and that the debt had been paid in 1943. It also alleged that the Maritime Commission had no authority in law to acquire outright title to the stock, and that its authority was limited to taking the stock as collateral. It further alleged that the defendants were wrongfully withholding the stock from the plaintiffs under the claim that outright ownership had been transferred to the United States by the 1938 transfers as the result of which the United States was the owner.

The District Court, of its own motion, dismissed the action as a suit against the United States. On appeal, the United States Court of Appeals for the District of Columbia reversed, *Dollar v. Land,* 154 F.2d 307. The Supreme Court granted certiorari and affirmed the Court of Appeals. *Land v. Dollar,* 330 U.S. 731. In affirming, the Supreme Court laid down the tests that would determine whether the United States acquired ownership of the shares or whether the Dollars are still the owners. The United States was not the owner and the Dollars were

> "* * * if either of respondents' [Dollars] contentions were established: (1) that the Commission had no authority to purchase the shares or acquire them outright; or (2) that, even though such authority existed, the 1938 contract resulted not in an outright transfer but in a pledge of the shares." (735, 736)*

Thereafter the case was tried, after filing of an answer alleging that the United States had acquired absolute ownership by the

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*For the foregoing facts, R. 184, 185; admitted, R. 244, 251. These admissions incorporated by reference the opinions of the Court of Appeals and the Supreme Court.

1938 transfer. The District Court entered judgment for defendants, *Dollar v. Land,* 82 F. Supp. 919. An appeal was taken to the Court of Appeals for the District of Columbia Circuit. That court not only reversed, but it directed entry of judgment for the plaintiffs. *It said that no court of equity could possibly hold that the transaction had been anything but a pledge, Dollar v. Land,* 184 F.2d 245 (July 1950). It held that the transfers of 1938 were a pledge only, and that the United States had never become owner.

The Department of Justice had conducted the litigation on behalf of the defendants, and it immediately petitioned the Supreme Court for certiorari. The Supreme Court denied certiorari in November, 1950. *Land v. Dollar,* 340 U.S. 884.

Judgment was entered for the plaintiffs (appellees here) in December 1950. Thereafter the Department of Justice again conducted appeals, unsuccessfully. *Land v. Dollar,* 188 F.2d 629. The Court of Appeals repeated that it had adjudicated that the transaction was a pledge and that the United States had never acquired ownership.*

Once again the Department of Justice petitioned for certiorari, and certiorari was once again denied, March 12, 1951. *Land v. Dollar,* 340 U.S. 948. Concurrently the Department of Justice petitioned for reconsideration of the earlier denial of certiorari, and that too was denied on March 12th. 340 U.S. 948.

Once again mandate went down, and judgment was entered for plaintiffs on March 16, 1951 (R. 198, 244, 251). Thereafter, contempt proceedings were instituted in the Court of Appeals for the District of Columbia Circuit, and that court issued two opinions which will be referred to from time to time in this brief, one on April 11, 1941, when it issued its orders to show cause, *Land v. Dollar,* 190 F.2d 366, and one on May 18, 1951, when it decided the contempt proceedings, *Land v. Dollar, Sawyer v. Dollar,* 190 F.2d 623. In its Findings and Conclusions of May 18, it said (190 F.2d at 632):

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*For the foregoing facts, R. 185, 187; admitted R. 244, 252, 253. The opinion of the Court of Appeals is incorporated by reference.

"The suit filed by the Dollar interests to recover possession of the shares of stock in question, which the members of the Maritime Commission held under the claim that they were owned by the United States, presented two basic justiciable issues. *Those issues were whether the United States owned the shares,* and whether the Dollar interests were entitled to possession; and *the answer to the latter depended upon the answer to the former.*

"Our decision of July 17, 1950, with respect to which certiorari was denied by the Supreme Court, *was that the shares were not owned by the United States* * * *."*

2. THE PRESENT SUIT.

Dollar v. Land came to a final decree at the end of 5½ years of litigation, reaching the Court of Appeals 3 times and the Supreme Court 4 times. Then, on March 12, 1951, following denial on that very day by the Supreme Court of the petitions for certiorari and for reconsideration of the previous denial, the Department of Justice filed the complaint in the present suit in the District Court for the Northern District of California.

The subject matter is exactly the same as in the District of Columbia litigation, which we shall hereafter for convenience refer to as *Dollar v. Land.* The named plaintiff is the "United States", as such; the defendants are the successful plaintiffs in *Dollar v. Land.*†

The complaint sought to quiet title to the identical shares of stock involved in that litigation. The basis on which it predicated title is the identical 1938 transfer based on the identical agreement of August, 1938, involved in *Dollar v. Land.* The issue raised is the identical issue there presented and decided, i.e., whether the 1938 transfer constituted an outright transfer of

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*Certiorari from the adjudication of contempt was granted November 13, 1951.

†There are other defendants, joined so that they may be subjected to an injunction against transferring the stock to appellees. They are American President Lines, its stock transfer agent, its registrar and its secretary. These defendants are not concerned in the main issue in the case.

ownership or a mere pledge to secure a debt. If the latter, judgment for the defendants was required.

This suit is an effort to relitigate *Dollar v. Land* out of sheer disgruntlement with the decision there reached.* This is revealed in plaintiff's motion for preliminary injunction filed a week after the complaint. It is there asserted that the decision of the Court of Appeals for the District of Columbia was a "serious miscarriage of justice" and "for that reason" the Department of Justice "has declined * * * to acquiesce in it" (R. 63).†

As the Court of Appeals for the District of Columbia said about the present suit in May, 1951, "the new litigation pictured to us in these papers involves no new law, person or circumstance" (*Land v. Dollar,* 190 F.2d 623, 646).

3. THE MOTION FOR JUDGMENT.

On May 15, 1951, defendants (appellees) filed their answer (R. 174-197). On the same day they filed a Request for Admissions of Fact under Rule 36, R.C.P. (R. 242).

On May 22nd they filed a motion to dismiss under Rule 12(b), a motion for judgment on the pleadings under Rule 12(c), and a motion for summary judgment under Rule 56 (R. 257). The motion specified that it was based on certain data, including the deposition of a government counsel, an affidavit of Moses Lasky, one of appellees' attorneys, and primarily "all admissions made in response to these defendants' Request for Admissions of Fact" (R. 260).

Plaintiff (appellant) offered no affidavits in opposition. It neither made nor tendered any contrary showing whatever. In its

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*If the Supreme Court had granted certiorari on March 12th, the complaint would not have been filed. The Department of Justice had sent an attorney beforehand to San Francisco, and, certiorari being denied, upon telephone instructions the complaint was filed within a matter of hours (R. 97-101).

†The same statement was made in the argument on that motion (R. 70). It was made again in the return filed on April 23, 1951 in the Court of Appeals for the District of Columbia Circuit in answering the contempt charges (R. 281).

present brief it asserts (pp. 49-52) that it has certain additional evidence. But no such showing was made in the court below as required by *R.C.P.* Rule 56. *The motion for summary judgment was submitted on the record made by appellees.**

The motion was briefed and argued in June 1951. On October 3, 1951 it was granted, and judgment was entered quieting title in appellees (R. 282-306).

From this judgment the appeal has been taken.

4. SUMMARY STATEMENT OF THE THREE PRINCIPAL GROUNDS OF THE MOTION FOR JUDGMENT.

The motion was made under the procedure succinctly described in 3 Barron and Holtzoff, Federal Practice and Procedure, Rules edition, pp. 107, 108.† And it was made on six grounds (R. 275), but the principal ones may be summarized thus:

1. The suit involves the same transaction as *Dollar v. Land* and the same issue whether certain transfers of shares in 1938 to the United States Maritime Commission were in pledge or a sale. The record on which *Dollar v. Land* had been adjudicated was introduced in support of the motion, and the truth of all matters therein proved was established in appropriate manners as by requests for admissions of fact, and no showing whatever was made in opposition (R. 259, 242, 126-130). As the District Court said, "In response to this showing the Government has done nothing" (R. 288). There was thus no genuine issue or fact, and the undisputed facts establish that the transfers were by way of pledge.

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*Nevertheless, at pp. 91-96, infra, we show the complete emptiness of the alleged new evidence.

†"Thus a defendant may move to dismiss a complaint for failure to state a claim upon which relief can be granted and may show that, even if the complaint is sufficient in this respect, undisputed facts not appearing in the complaint entitle him to a summary judgment in his favor. * * * Motions to dismiss and for summary judgment may be considered together.

"* * * Motions for judgment on the pleadings and for summary judgment may be considered together, and where both are made they need not be treated separately as if the first dealt only with issues of law on the pleadings and the second only with issues of fact."

On precisely the same facts a United States Court of Appeals had held that no conclusion was possible other than that the transfers were in pledge. That decision, as a matter of authority or *stare decisis*—apart from any question of *res judicata* or collateral estoppel—showed that there was no genuine issue of fact.

2. The adjudication in *Dollar v. Land* that the 1938 transfers were in pledge is conclusive on the plaintiff because of facts *occurring after* the Supreme Court's decision in April 1947 in *Land v. Dollar,* 330 U.S. 731. Up to that point the Department of Justice had been in the cause only to protest against the exercise of jurisdiction. Being overruled on that protest, the Attorney General had a choice to step out of the litigation or, deciding that the interests of the United States were better served by handling the case on the merits, to stay in. He chose the latter. He and those acting under his supervision handled the case at all subsequent stages, in the name of defendants, but on behalf of the United States, asserting that they were doing so as government counsel and that the United States was the real party in interest. Throughout the subsequent course of the litigation they completely took over, controlled and handled the case against the Dollars to the entire exclusion of anyone else, doing so at the expense of the Treasury, for the benefit of the United States, and for it as the real party in interest. In the words of *Drummond v. United States,* 324 U.S. 316, 318, the United States, though not formally a party, took the laboring oar in the controversy.

3. In *Land v. Dollar,* 330 U.S. 731, the Supreme Court ruled that if the Commission had no authority to purchase the shares or acquire them outright, the United States never acquired title. Here the complaint rests the United States' claim of title on the identical transfers, and so on the face of the complaint the identical issue is presented. That is purely an issue of law. The Maritime Commission did not have the authority, and therefore the complaint shows on its face that the United States acquired no title.

B. The Record on Which the Motion for Judgment Was Based and Decided.

Appellant's brief shows a complete misconception of the record on which the motion for judgment was made and decided.

The third ground of the motion required no extrinsic showing. It turns on a pure question of law appearing on the face of the complaint itself.

The other two grounds required a showing outside of the complaint:

RECORD ON DEFENSE OF COLLATERAL ESTOPPEL

The defense that appellant was barred on principles of collateral estoppel required, of course, a showing of the judgment entered in the District of Columbia litigation. That judgment was established by allegations of appellant's own complaint (R. 6, 7), admitted by the answer (R. 177) and by response to request for admission No. 4 (R. 244, 251, 198).*

If the "United States" had been a party *eo nomine* to the District of Columbia litigation, it would have been unnecessary to do more than establish the judgment, which would be binding as a matter of *res judicata.* Since the United States was not a party *eo nomine,* it was necessary to go further—to show the presence of certain additional but undisputed facts. These are detailed at length at pp. 13-17, infra, summarized at p. 7 above, and may for convenience be described as the fact that the United States conducted the District of Columbia litigation for its own interests.

These facts were established thus:

(a) The record in the District of Columbia litigation was introduced. Attached to the request for admissions of fact was a certified copy of the Joint Appendix to the briefs in the Court of Appeals for the District of Columbia on the appeal which resulted

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*Copy of the judgment of the Court of Appeals of January 31, 1951 was attached to the complaint as Exhibit B. Printing of this exhibit was dispensed with by order of this Court.

in judgment for appellees in July 1950 (Request 2, R. 242).* In response appellant admitted that this was the record up to that date (R. 250). The subsequent proceedings in the District of Columbia litigation up to January 31, 1951, appear in two transcripts in the Supreme Court, identified in the answer (R. 189) and admitted in response to request for admission No. 3 (R. 244, 251). The later occurrences are covered by the allegations of the answer (R. 189, 190; admitted R. 254 in response to requests 5(f) and (g), R. 244).†

In response to Requests for Admission appellant admitted that everything shown by these records to have happened in the litigation did happen (Requests 2c, 3, R. 243, 244, 251).

These records, so authenticated and received below in support of the motion, show how the District of Columbia litigation was conducted, the part played by the Department of Justice, and the issues litigated and decided.

(b) The reporter's daily transcript of the trial in *Dollar v. Land* contained many arguments and statements of counsel showing the position played by the Department of Justice in the conduct of the litigation. Many of these were omitted by mutual agreement from the Joint Appendix referred to above because not relevant to the issues then to be decided. These were brought before the court below by affidavit of Moses Lasky in support of the motion for summary judgment (R. 264-275).‡ In perform-

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*Under the rules of that court the record is not printed but the parties print in a Joint Appendix to their briefs all the record deemed material. The Joint Appendix is thus the same as the record printed under the rules of this Court, except that it is printed by the parties and not the Clerk.

†The response to Request 5g denied that a certain exhibit was a true copy of an order entered by the District Court for the District of Columbia on March 16, 1951. But on hearing of the motion for summary judgment a certified copy of the order was offered and received (R. 129, 319, 200).

‡Thus the affidavit recited (R. 264):

"At all times during said trial I was associated with Gregory A. Harrison, Esq., as one of the attorneys for the plaintiffs in that action, and, as such, was present in court during the entire trial. I have in my possession a daily transcript of the trial by the official

ing that function the *affidavit tendered no disputed facts.* It merely served as a vehicle to quote from the official transcript, and the passages so laid before the court below are not and never have been disputed by appellant here.

(c) Other facts concerning the part played by the Department of Justice were laid before the court by other requests for admissions and responses thereto (Request 5(e), (h) to (l), inc., R. 244, 253-255, 188, 190, 191).

Obviously, the foregoing showing was admissible in support of the claim of collateral estoppel. The record in another cause is always admissible to ascertain the subject matter of the controversy and the scope of the thing adjudged. *Washington Gas Co. v. District of Columbia,* 161 U.S. 316, 329; *Standard Surety & Cas. Co. v. Standard Accident Insurance Co.,* 104 F.2d 492, 496, fn. 1 (8 Cir.). And if facts in addition to a judgment itself are pertinent to show that it is binding on a party in a subsequent litigation, they may be proved. If the record of the prior litigation shows those facts, and is admitted to correctly state them, naturally it is admissible for the purpose.

RECORD ON DEFENSE OF NO GENUINE ISSUE

Appellant is particularly confused as to the nature of the showing in support of the motion for judgment, as respects the first ground of the motion summarized above, namely, that even apart from any question of collateral estoppel no genuine issue of fact exists.

Appellant objects that the record in *Dollar v. Land* was not admissible here. What it overlooks is that appellees did not merely

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court reporter, Thomas O'Neal, certified by him, and all quotations below are from that transcript. The whole of the transcript will be produced in court at the hearing of the motion for summary judgment, if the authenticity of any of the quotations is denied. Plaintiff already has a copy of the transcript. Furthermore, I personally heard all said remarks made."

An identical procedure for bringing facts before the court on motion for summary judgment was followed and approved by this Court in *Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd.,* 185 F.2d 196 at 202, 2d col.

prove the record, they also proved the facts disclosed, i.e., the facts established in the District of Columbia litigation.*

The vast bulk of the evidence and all the important controlling facts in *Dollar v. Land* were stipulated. Attached to the Request for Admissions of Fact here, as Exhibit 1, was a certified copy of the Stipulation of Facts entered into in that case. By Request No. 1 the Department of Justice was asked to admit that every matter which in that case it had stipulated to be true is still true (R. 242). Plaintiff gave that admission (see pp. 12, 13, infra). Thus it was a stipulated fact on the motion for summary judgment, not merely that the stipulation had been entered into in the District of Columbia litigation, but that the facts there stipulated are facts here.†

Moreover, although oral evidence played a minor part in the case, it was admitted, in response to Request 2(d) (R. 243, 251), that all witnesses shown by the Joint Appendix to have testified at

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*Appellant's brief (pp. 42, et seq.) cites *Arnstein v. Porter,* 154 F.2d 464. That case is not in point. There defendant filed a novel motion to dismiss a copyright infringement suit as vexatious, relied on the fact that the plaintiff had lost similar suits against other people, and asked the court to take judicial notice of the records in the other cases. Here appellees *proved* the record in *Dollar v. Land* and in addition independently proved the facts which had been proved in that case. Compare *Leishman v. Radio Condenser Co.,* 167 F.2d 890 (9 Cir.), cer. den. 335 U.S. 891, discussed at p. 66, infra.

†Appellant argues (fn. 31, p. 40) that Exhibit 1 attached to the Request did not have attached to it the various documents which the stipulation identifies and authenticates. Appellant overlooks the simple mechanics by which the facts were established below. That stipulation had not been placed in evidence in *Dollar v. Land,* en masse, but counsel placed in evidence such of the stipulated facts and documents as were material. And these matters appear in the Joint Appendix.

In response to Requests for Admission appellant admitted (R. 243, 251, 309) that the Joint Appendix truly sets forth all matters which it purports to state (Request No. 2(c), that wherever any exhibit identified therein as one of the documents authenticated in the Stipulation of Facts is set forth in full, it is a true copy of the document (Request 2(e)), and wherever any exhibit identified therein as one of the documents authenticated in the stipulation is partially set forth, the portion so set forth is correctly stated and the portion omitted is not material (Request 2(f)).

the trial in the District of Columbia litigation were first duly sworn and having been sworn testified as said Joint Appendix shows. Thus the sworn testimony of these witnesses was before the court in support of the motion, as fully as if restated in affidavits. In fact, the situation is much stronger. It is exactly as if depositions of these witnesses had been taken in this cause and offered in support of the motion, because their statements are not *ex parte;* the testimony was given subject to cross-examination, and the examination, direct and cross, *was by the very same counsel who appear in this case for the parties here.*

Thus in support of the motion for summary judgment appellees did not merely prove what record was before the District of Columbia courts. *They proved, by admission, the facts on which it must be determined whether the 1938 transfers were a pledge.*

And in opposition appellant here offered no additional or contrary showing.

In the whole history of summary judgment procedure never has there been a more perfect or ideal foundation for a summary judgment. Here was no battle of affidavits. This case was unique. *There has been laid before the court a complete body of facts, admittedly undisputed, which are the very facts on which precisely the same issue was decided by a United States Court of Appeals, whose decision the Supreme Court declined to review.*

The consequences that flow from that showing we discuss at pages 61-96, infra.

THE FACTS WHICH APPELLANT WAS REQUESTED TO ADMIT WERE ADMITTED

In response to some of the requests for admissions of fact, appellant's original statement fenced (see R. 246, *et seq.*), but made no denial. Under Rule 36, R.C.P. that response was an admission (cf. R. 289). We need not heap up authorities on that matter now; it is no longer controversial, or as appellant concedes in its brief (p. 40, fn. 31) "not now material," because later in the District Court plaintiff-appellant filed in writing the following admission (R. 309):

"Hence plaintiff can now state that the matters stated in said stipulation to be facts are such, that the exhibits attached to said stipulation are true copies of the documents they purport to be, and that the Joint Appendix printed for the District of Columbia Court of Appeals in Dollar v. Land correctly sets forth the exhibits, or parts thereof, which it purports to do and that the portions of exhibits omitted from the Joint Appendix were then considered for the purpose of the appeal for which said Joint Appendix was prepared, to be not relevant."

C. The Government Conducted the District of Columbia Litigation and Did So for Its Own Benefit and at Its Expense.

At all times after the decision of the United States Supreme Court on April 7, 1947, the Attorney General of the United States and the Department of Justice under his supervision handled the litigation in *Dollar v. Land.** From first to last, he controlled the case, he did so for the United States, at its expense, and for its interests. The record defendants were treated by him as mere names, which he used for his purposes. In reality, the nominal defendants had nothing whatever to do with the case.

He and they appeared for and in the name of the defendants, filed the answer in their name, filed and executed all stipulations in the cause, including stipulations covering evidence, prepared and tried the case, handled it on the several appeals and the several proceedings in the United States Supreme Court in the names of the defendants and of Charles Sawyer, Secretary of Commerce, and in the name of the United States. All acts whatsoever performed, done or committed at every stage of the proceedings in the name of the defendants were handled by the Attorney General and the Department of Justice. They completely took over the case in opposition to plaintiffs and controlled and handled it to the complete exclusion of anyone else. They sought an adjudication that the agreement of August 15, 1938 and the transfers made pursuant thereto on or about October 26, 1938 were not a

*They also did so prior to that decision, but what occurred before then is irrelevant, as we note at pp. 20, 21, 31-34, infra.

pledge but an outright transfer of title and ownership to the United States, and that the United States thereby became, was and is the owner of said shares. All this was done for the benefit of the United States, and for it as the real party in interest. And it was so conducted to the knowledge of the courts and of all parties to the cause.

Moreover, the litigation was conducted at the expense of the Treasury of the United States. Appellees' answer in the instant case alleged (R. 191):

> "Throughout said litigation from first to last the defense was conducted at the expense of the Treasury of the United States."

In Request for Admission No. 5(k) appellant was called on to admit this statement (R. 244) and it did so (R. 255).

From first to last the Department of Justice asserted that it was handling the case as the government. Beginning with their opening statement at the trial and concluding with their closing argument, the attorneys for the Department of Justice who handled the case so referred to themselves. These passages are too meaty to quote here in full; we refer to the record (see R. 265-275). Suffice it to note that *these attorneys expressly told the court* that while their clients "technically are certain individuals", *their real client was "The United States of America"* (R. 268)* *and that "the Government is the real party in interest"* (R. 267).†

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*"The Court: Let me ask you this: Who is the client here?
"Mr. Siegel: The clients technically are certain individuals.
"The Court: *Who is the client?*
"Mr. Siegel: *The United States of America,* if the Court please."

†"*I may say, Your Honor, in taking the view that the Government is the real party in interest,* we have in truth allowed or waived, in effect, a limitation upon the evidence which would be perfectly permissible. If, for example, this action is in truth an action taken only against the individuals concerned, then clearly the evidence which is being offered as admissions could not be admissible against any of the defendants except those who were defendants who make the admissions, or their successors in interest; and succeeding members on the Commission would in no sense be successors in interest to their predecessors on the Commission.

"I have, however, made no such limitation and do not want to put any such technical limitation on the proof, though I could clearly on their theory of the action."

Appellant tries to minimize these statements by saying that counsel spoke from force of habit (Br. 24). No such explanation holds water.

We are dealing with *realities,* not fictions. The reality is disclosed by a brief filed on behalf of the Secretary of Commerce, Mr. Sawyer, in January 1952, in the United States Supreme Court in *Sawyer v. Dollar,* No. 247, October Term, 1951—the contempt proceedings referred to at page 3, supra. We adopt the statement as our own. Speaking of *Dollar v. Land* Mr. Sawyer states (p. 34):

> "The Department of Justice as the primary litigating branch of the government handles Government suits upon its own responsibility and, in the light of the size and complexity of the executive branch, of necessity with relatively little direct consultation with department heads who are nominal parties. The result is that the head of a department who is a party to a suit does not have the control and usually does not have the familiarity possessed by an ordinary private litigant. He relies practically as well as legally upon the advice of the Attorney General.
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> "These statements are sharply illustrated by the present case. The controversy concerned the legal effect of an agreement made many years previously by a predecessor agency. Petitioner had only recently succeeded to the functions of that agency, and at a time when this case had been in the courts for several years under the direction of the Department of Justice. Although generally aware of this litigation he had had no personal participation in it. * * * he was in the hands of the Attorney General."

The trial court itself in *Dollar v. Land* often referred to the defendants as the "government". These references were not casual: for example, in its order settling the findings on March 21, 1949, that court recited "*Government* counsel has submitted fifty-one findings of fact * * *" (J. A. 276).

Mr. MacGuineas, an attorney in the Department of Justice, one of the appellants' attorneys and one of the attorneys for the defendants in *Dollar v. Land,* testified here. He said that he

acted as counsel in *Dollar v. Land* "in [his] capacity of attorney in the Department of Justice", that as such he assisted another attorney in the Department in the trial, wrote the briefs and argued the cause orally in the Court of Appeals on the merits. As such he and his superiors in the Department represented the defendants after the mandate went down, both in the trial court and again on the subsequent appeals, appearing also for the Secretary of Commerce and the United States. As such he prepared the first draft of a petition for certiorari in the United States Supreme Court, the final draft being prepared and filed by the Solicitor General of the United States. He testified that in all this activity he acted under official assignment from his superiors in the Department of Justice.

Asked whether he "acted * * * as attorney in the Department of Justice of the United States," he replied: "Entirely, I have never acted—*I have never done anything in connection with that litigation except in my official capacity as an attorney in the Department of Justice pursuant to instructions from my superior officers*" (R. 84-92).

And in the court below, in describing the case of *Dollar v. Land,* he said:

> "Much evidence was adduced by both sides of surrounding circumstances with respect to this transaction, the *Government,* of course, asserting that it was an outright transfer of absolute title and the defendants [i.e., defendants in the instant case] asserting that it was merely a pledge"* (R. 69).

Another striking fact is this: On June 10, 1947, after the Supreme Court held that the action could be maintained (*Land v. Dollar,* 330 U.S. 731) and after the mandate went down, appellees (plaintiffs there) and the Attorney General acting through Assistant Attorney General Peyton Ford, stipulated that neither

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*The same counsel also said (R. 73, 74):

"*We* have taken two appeals to the Court of Appeals" and "I was present at the trial of that case, Your Honor. Do you want to know also about the *Government's* appeals?"

the shares of stock nor the certificates representing them would be sold, transferred or otherwise disposed of until final determination of the cause, and on June 11, 1945, the court so ordered. (J. A. 53; R. 195-244 (Request 6), 256).

These are the facts. Their significance we discuss below (see pp. 18-61, infra).

Argument

Under the test laid down by the Supreme Court, there are two main issues (p. 2, supra):

1. Did the Maritime Commission have authority to purchase the shares or acquire them outright?

2. Even if it did, were the 1938 transfers in pledge or a sale?

The District Court, in granting the motion for judgment, did not answer the first question. Nevertheless, if the Commission did not have the requisite authority, the United States never acquired title, *Land v. Dollar,* 330 U.S. 731, and the judgment quieting appellees' title is correct. If correct on that ground, it must be affirmed although the District Court acted on other grounds. *Helvering v. Gowran,* 302 U.S. 238, 245; *Le Tulle v. Scofield,* 308 U.S. 415.

The District Court held that the transfers were a pledge. It rested on two grounds, each independently sufficient. As it said in its opinion (R. 289):

> "The Dollar defendants have made an affirmative showing that the issues in this case are the same as those which were before the courts in the District of Columbia and have heretofore been adjudicated. Defendants argue that plaintiff is concluded as to the issues there decided. Or, alternatively, if the Government is not estopped that the case is before us on the identical record upon which the Court of Appeals was compelled to reverse on the grounds that it contained no substantial evidence of absolute transfer. *A fortiori,* no genuine issue of fact is here presented and a summary judgment must be entered for defendants."

We shall discuss these two grounds and shall then discuss the issue of statutory authority.

I.

APPELLANT IS BOUND BY THE DISTRICT OF COLUMBIA JUDGMENT ON PRINCIPLES OF COLLATERAL ESTOPPEL.

A. Preliminary.

As said in *Stoll v. Gottlieb,* 305 U.S. 165, 172, "it is just as important that there should be a place to end as that there should be a place to begin litigation".

The issue whether the transfers were in pledge has been tried, has been decided, and it has been held that the transfers were in pledge only. That trial was long, the record exhaustive.

The January 1952 issue of the Harvard Law Review (Vol. 65, No. 3) contains a detailed review of the Dollar litigation and discusses the question of "collateral estoppel against the United States" (pp. 476-478). The review concludes that the judgment here on appeal is correct. The article states (477):

> "* * * the Government should be bound by the decision of the District of Columbia court on the issues there considered. And since the Government raised no new issues in the California proceeding, the court there properly awarded summary judgment to Dollar. To have held otherwise, in the words of that court, 'would be to enlarge the rather grotesque spectacle of the government which has refused to submit to the rulings of its own courts, and to fix a pattern in future litigation of similar character which would not only make confusion twice confounded, but would tend to destroy the law to which men have given their confidence and their honest respect.' "

If the United States, *eo nomine,* had been a party to the District of Columbia litigation, the judgment would be binding on it under principles of *res judicata.* Yet, had it appeared in its own name it would have been represented by no different attorneys than those who in fact tried the case, the case would have been handled and controlled in identically the same way as it was, the

record would have been the same, the same pocketbook would have paid the bills!

What is involved is a basic principle of justice and morals. As said in *Caterpillar Tractor Co. v. International Harvester Co.,* 120 F.2d 82, 84 (3 Cir.):

> "* * * The general principle back of the rules of res judicata has received recent and clear statement by the Supreme Court. *'Public policy dictates that there be an end of litigation; that those who have contested an issue shall be bound by the result of the contest;* and that matters once tried shall be considered forever settled as between the parties.' * * * A litigant is to have his day in court, but only one day in court, against another."*

Modern law applies these principles to situations where a litigant was not a party of record in the first cause. In such a case it may not apply *res judicata* but rather what is known as "collateral estoppel". *Res judicata* operates as a merger or bar of all claims that could have been asserted and litigated, and the litigant is not only bound by what is actually raised and decided, but he is precluded from later raising any issue that would have affected the result (cf. *In re Chiles,* 89 U.S. 157). Under *collateral estoppel* one is at least bound by the determination of an issue of law or fact actually litigated and decided.

Here the issue litigated in *Dollar v. Land* was the nature of the transfer of October 1938 made pursuant to the agreement of August 15, 1938. If the United States was a party, *eo nomine,* to the District of Columbia litigation, it can assert no basis of title whatever now. If it was not a party of record to the District of Columbia litigation, it would be free to assert that it acquired title to the shares in some other way or by some other transaction than the transfers of October 1938 made pursuant to the agreement of August 15, 1938, but under principles of collateral estop-

*It is a "generally accepted precept that a party who has had one fair and full opportunity to prove a claim and has failed in that effort, should not be permitted to go to trial on the merits of that claim a second time." *Bruszewski v. United States,* 181 F.2d 419, cer. den. 340 U.S. 865.

pel the United States is conclusively bound by the determination of the nature of that transfer.

These distinctions are stated in the cases cited in appellant's brief (pp. 13-14, fn. 9).

The question of *res judicata,* i.e., merger or bar, need not be considered in this case because the complaint affirmatively alleges that title was in the appellees or their predecessors and bases its alleged title solely on the claim that the United States derived title from them by the 1938 transfer. And that precise issue was the very core of *Dollar v. Land.**

As said in 65 Harvard Law Review 477:

> "A distinction can validly be drawn here between applying merger or bar to the Government and applying collateral estoppel. In the latter case, if the Government presents new issues it may be heard. Absent such untried issues, the Government should not have a second day in court, a privilege denied to the private litigant. * * * If the private litigant must cope with the powerful litigation forces of the United States, he should derive some benefit from his effort."

THE CONTROLLING FACT:—THE CONDUCT OF DOLLAR V. LAND AFTER THE DECISION OF THE JURISDICTIONAL ISSUE

As we shall see, the chief basis for appellant's contention that the judgment in *Dollar v. Land* does not conclude it is the statement made in 1947 in *Land v. Dollar,* 330 U.S. 731, that a judgment would not be *res judicata* against the United States. That statement expresses the law applicable to the only facts to which it could or did relate. But our contention rests on facts *thereafter* occurring, which were not and could not have been before the court.

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*Appellant (Br. 19, 20) refers to the District Court's statement that the United States will not be permitted to litigate its title unless "a substantial factual issue was present other than that decided in Dollar v. Land" and complains that the court "confuse[d] the res judicata issue with the question of the propriety of summary judgment procedure." It is appellant that is confused. The District Court was stating the difference between "res judicata" and "collateral estoppel" as applied to this case.

Up to the time of that decision the handling of the case by the Attorney General could have had no special significance, since the sole issue raised up to that point was whether the case could be maintained at all. It being decided that it could, *thereafter* the case proceeded on its merits.

If it was desired that the United States should not be bound by the eventual judgment, the Department of Justice should have been in the cause "only to protest against the exercise of jurisdiction by the court" and no further (*Clark v. Barnard,* 108 U.S. 436, 448). Being overruled on that protest, it should then have stepped out. It did not do so. Instead, as we have seen, the Attorney General and those acting under his supervision in the Department of Justice appeared in the name of defendants, tried the case on its merits, and handled it at every stage thereafter, in every court, through the several appeals, petitions in the Supreme Court, motions to vacate the judgment made in the name of the United States, of the Secretary of Commerce, and of the defendants, etc. And appellant is now asserting its claim in the instant case by the same counsel as have already presented it in *Dollar v. Land.*

ORDER OF DISCUSSION

Our discussion will proceed in the following order:

1. Modern law recognizes that one is bound by a judgment in a case in which he is not a party in circumstances such as are here present.

2. These principles apply fully to the United States.

3. The cases on which appellant relies do not support it.

4. Contrary to appellant's assertion, neither the Supreme Court nor any other court has held that the judgment in the District of Columbia litigation is not binding on the United States. The issue was never presented in any court until pleaded by answer below and raised by the motion for judgment, and it could not have been raised until then.

B. Under Modern Law, Where One Controls a Case He Is Bound by the Judgment Though Not a Party Formally.

The modern law on the subject of collateral estoppel is clear. As said in the *Restatement of Judgments,* Sec. 84:

> A person who is not a party but who controls an action, individually or in cooperation with others, is bound by the adjudications of litigated matters as if he were a party if he has a proprietary or financial interest in the judgment or in the determination of a question of fact or of a question of law with reference to the same subject matter or transaction; if the other party has notice of his participation, the other party is equally bound.
>
> "Comment:
>
> "a. *Rationale.* * * * A person is entitled only to one adjudication of a cause of action or of an issue where he has control of the proceedings; if under the circumstances to which this Section applies a person has control over or participates in the control of the proceedings it is not unfair to him that the judgment or adjudication should determine the existence and the extent of interests which are dependent upon the determination of issues in the action leading to the judgment. * * *
>
> "b. *Scope of rule.* * * * In the same way, where the one in control of the action or the defense has no interest in the precise subject matter of the suit but controls it because of his connection with the transaction out of which the suit arose, he is bound by and entitled to the benefits of the rules of res judicata upon issues which are actually litigated."

And see Section 83.

Judge Learned Hand, in *Minneapolis-Honeywell Regulator Co. v. Thermoco, Inc.,* 116 F.2d 845 at 846 (2 Cir.), states:

> "It has been settled doctrine in federal courts for at least seventy-five years that when a person not a party to the action takes over its defence, he may take advantage of the judgment if he wins, and he will be bound by it if he loses, exactly as though he were a party of record (Lovejoy v. Murray, 3 Wall. 1, 18, 19, 18 L.Ed. 129)."

Judge Hand here traces the roots of the doctrine back to *Lovejoy v. Murray.* In that case the Supreme Court held certain

persons bound by a judgment although they were not parties of record. Pointing out that they had assumed the defense, the Supreme Court said (3 Wall. 1, 18):

> "They were defending their own acts, although the suit was in the sheriff's name. They had full right to make all defense there, which they could make here. They could adduce witnesses, and cross-examine those of plaintiff, and could have taken an appeal. The case is wanting in none of the elements so happily stated by Mr. Greenleaf, as rendering a former judgment conclusive in a second suit. 'Justice requires', he says, 'that every cause be once fairly and impartially tried; but the public tranquillity demands that, having been once so tried, all litigation of that question, and between the same parties, should be closed forever. It is also a most obvious principle of justice, that no man ought to be bound by proceedings to which he is a stranger; *but the converse of this rule is equally true, that by proceedings to which he was not a stranger, he may well be bound.*' "

And so in the present case the Department of Justice controlled *Dollar v. Land,* had the power to make the same case as here, produce witnesses, cross-examine, conduct appeals. *And it did all of these things.*

At the time of *Lovejoy v. Murray,* the doctrine of collateral estoppel was yet to develop to its present boundaries, for it still then was tied to questions of privity. Since then, the underlying principles of morals have broken through the confines of archaic expression. As said in *Caterpillar Tractor Co. v. International Harvester Co.,* 120 F.2d 82 (3 Cir.) (at p. 84):

> "That the doctrinal basis of res judicata is living law and not archaic formula is shown in its authoritative extension in recent years. American Surety Co. v. Baldwin, 1932, 287 U.S. 156 * * *; Davis v. Davis, 1938, 305 U.S. 32 * * *; Stoll v. Gottlieb, 1938, 305 U.S. 165 * * *; Treinies v. Sunshine Mining Co., 1939, 308 U.S. 66 * * *."

In *Bruszewski v. United States,* 181 F.2d 419, 422 (3 Cir.), cer. den. 340 U.S. 865, the court, discussing the broadening of rules of conclusiveness of judgments, states:

> "We are in accord with this development of the law away from formalism which impedes the achievement of fair and desirable results."

The full expression of the doctrine of collateral estoppel was not reached in the Supreme Court until 1910 in *Souffront v. Compagnie Des Sucreries,* 217 U.S. 475, at 486. There it was said:

> "* * * The persons for whose benefit, to the knowledge of the court and of all the parties to the record, litigation is being conducted cannot, in a legal sense, be said to be strangers to the cause. The case is within the principle that one who prosecutes or defends a suit in the name of another to establish and protect his own right, or who assists in the prosecution or defense of an action in aid of some interest of his own, and who does this openly to the knowledge of the opposing party, is as much bound by the judgment and as fully entitled to avail himself of it as an estoppel against an adverse party, as he would be if he had been a party to the record."

And see also *Hewes v. Gay,* 11 F.2d 165 at 166.

In *Caterpillar Tractor Co. v. International Harvester Co.,* supra, the court held that a judgment bound a person not a party who defended the suit on behalf of the record defendant, even though such participation was not open and avowed. After making the statement quoted at p. 19, supra, the court said:

> "The defendant here is in the position of asking for two days in court if he successfully masked his participation upon his first appearance. * * * An argument which seeks to establish a rule directly contrary to this broad principle must justify itself pretty clearly to be successfully maintained."

It must be conceded—and appellant has in fact conceded—that *the facts of the litigation here would make the principles of collateral estoppel fully applicable if the suit were between private parties.*

But no different rule applies where a government is involved.

C. The Same Principles Apply to a Government, Including the Government of the United States.

The gist of appellant's discussion apparently is that different principles of *res judicata* or its allied body of law apply to the United States than to private parties.* And in this connection some shocking things are said. For example, the District Judge had quoted (R. 299) a passage from *Cruise v. City and County of San Francisco,* 101 C.A.2d 558, and appellant denies that this is the law of the United States (Br. 31). But the quoted passage had said:

> "The government should not be permitted to avoid liability by tactics that would never be countenanced between private parties. The government should be an example to its citizens, and by that is meant a good example and not a bad one."

Similar statements may be found in federal cases.† By denying them, appellant insists that a government may set a bad example and indulge in conduct the law will not tolerate in others.

In fact, the rules of *res judicata* and collateral estoppel applicable to the United States are the same as those applicable to anyone else.

In contending that the judgment in *Dollar v. Land* is not conclusive on it, appellant falls back on a statement in *Land v. Dollar,* 330 U.S. 731 (1947) which in turn was based on a passage in *United States v. Lee,* 106 U.S. 196, 222. But this very passage in the *Lee* case clearly conceived that the rights of the United States to relitigate any case were the same as those of any private party,

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*Appellant goes so far as to say (Br. 28) that the Restatement of Judgments states that its general principles do not apply where the prior judgment is sought to bind the sovereign. The Restatement does not so state. It merely says that the extent of a sovereign's immunities is not a subject on which the Restatement purports to review the law.

†In *United States v. Utah, Nevada & California Stage Co.,* 199 U.S. 414, 423: "The same principles of right and justice should control * * * between the Government and individuals." *United States v. 43.7 Acres,* 43 F. Supp. 347: "But the Government must deal fairly and aboveboard with individuals and corporations, just as the Government expects the later to deal with it." (352). And see the cases cited at pages 52, 53, infra.

no more, no less.* At page 48, infra, we discuss the *Lee* case further and show that it does not support appellant.

In its opinion of May 18, 1951 in *Land v. Dollar,* 190 F.2d 623, 647 (1st col.), the Court of Appeals for the District of Columbia notes that the application of the rules of *res judicata* is the same as respects the United States as it is any other non-party of record.

In fact, *the Supreme Court has explicitly held that the rules of collateral estoppel do apply to the United States.*

In 1944, in *Drummond v. United States,* 324 U.S. 316 at 318, it said:

> "* * * If the United States in fact employs counsel to represent its interests in a litigation or otherwise actively aids in its conduct, it is properly enough deemed to be a party and not a stranger to the litigation and bound by its results. Compare *United States v. Candelaria,* 271 U.S. 432; 16 F.2d 559, with *Logan v. United States,* 58 F.2d 697. But to bind the United States when it is not formally a party, it must have a laboring oar in a controversy."

In *Dollar v. Land* the United States not only had the laboring oar, but the individual defendants wielded no oar at all (see pp. 13-16, supra).

In *United States v. Candelaria,* 271 U.S. 432, cited in the quotation above, the Supreme Court said (at p. 444) in answering a certified question:

> "But, as it appears that for many years the United States has employed and paid a special attorney to represent the Pueblo Indians and look after their interests, our answer is made with the qualification that, if the decree was rendered in a suit begun and prosecuted by the special attorney so employed and paid, we think the United States is as effec-

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*The precise passage in the *Lee* case is this (p. 222):
"Another consideration is, that since the United States cannot be made a defendant to a suit concerning its property, and no judgment in any suit against an individual who has possession or control of such property can bind or conclude the government, as is decided by this court in the case of *Carr v. United States,* already referred to, the government is always at liberty, notwithstanding any such judgment, to avail itself of all the remedies *which the law allows to every person, natural or artificial,* for the vindication and assertion of its rights."

tually concluded as if it were a party to the suit. *Souffront v. Compagnie des Sucreries,* 217 U.S. 475, 486; *Lovejoy v. Murray,* 3 Wall. 1, 18; *Clafin v. Fletcher,* 7 Fed. 851, 852; *Maloy v. Duden,* 86 Fed. 402, 404; *James v. Germania Iron Co.,* 107 Fed. 597, 613."

Following this answer, the Eighth Circuit held, *United States v. Candelaria,* 16 F.2d 559, that a judgment in the prior action in a state court, to which the United States was not a party, nevertheless was conclusive against the United States.

These two cases apply to the United States the very same rules concerning conclusiveness of a judgment in an action to which it is not a party of record as are applied to private parties.

Appellant would distinguish the *Candelaria* case on the ground that the party for whom government attorneys appeared in the first suit was a plaintiff (Br. 27). That is a distinction without a difference. In support of its rule the Supreme Court in the *Candelaria* case cited the *Souffront* case, supra, where the Court stated the principle as applying indifferently to "one who prosecutes *or* defends a suit in the name of another to establish and protect his own right or who assists in the prosecution *or* defense of an action in aid of some interest of his own." In turn the *Candelaria* case was cited in the *Drummond* case as authority for the principle that the United States is bound by a prior suit to which it is not a party of record where its attorneys appeared for the defendant and had the laboring oar.

Thus the Supreme Court has had in mind no distinction between the situation of being on the plaintiff's side and defendant's side. The *Candelaria* case cited as its authorities the *Souffront* and *Lovejoy* cases and was in turn cited in the *Drummond* case. The United States Supreme Court has thus made it clear that *the rule applicable to private parties applies in all respects to the United States.*

Appellant appreciates the devastating effect of the *Drummond* case and so tried to escape it in the court below by calling it dictum. It was not dictum. It was a statement of the governing principle which the Court laid against the facts to decide the case.

Appellant does not now use the term "dictum," but its argument (Br. 27) is the same thing.

Appellant tries to distinguish the *Candelaria* case on another ground (Br. 27). It argues that what was involved in the first suit was the title of the Indian tribe, states that the United States was precluded only from relitigating the tribe's title, not any title it might assert in itself, and suggests that the reason was that the tribe was a party to the first suit. It is settled that the mere fact that an Indian tribe is a party to a suit does not preclude the United States asserting title in the tribe in a later suit over restricted Indian property. *Bowling v. United States,* 233 U.S. 528. The *Candelaria* opinion clearly shows that the United States would not have been precluded from relitigating the title of the tribe, its ward, *except for the fact that the United States had handled the case by its own attorney.* So also the fact that what was in issue was the tribe's title is pointless. The United States was precluded from relitigating whatever was decided in the first suit. So here, the United States is precluded from relitigating what was involved in *Dollar v. Land,* i.e., the nature of the 1938 stock transfers. If it should assert a title based on some other transactions, it would not be precluded (see pp. 19, 20, supra). But it asserts no other transaction.

Still other cases show that the principles on which we rely apply to governments as well as to private parties.

In *Gunter v. Atlantic Coast Line Railroad Company,* 200 U.S. 273, the State of South Carolina was held bound by a judgment rendered in a suit against county officers, and an injunction against maintaining another suit was sustained. The Supreme Court, noting (p. 283) that a State may not be sued without its consent and that a suit against state officers is not a suit against the state, pointed out that a state may, however, voluntarily become a party and will be bound if it does so (p. 284). It further noted that the state was there not a party *eo nomine* in the first suit and that the mere fact that the suit was against state officers did not make it a party (p. 284).

But it held that the state had voluntarily become a party, although not of record, *because the State Attorney General,* acting under authority of law, had appeared and filed the answer on behalf of individual defendants (p. 287), tried the suit and conducted the subsequent appeal in his name as their attorney.

Appellant's brief (p. 32) tries to distinguish the *Gunter* case by saying that there was express legislation authorizing maintenance of the suit against the sovereign. The only legislation there present was of the same character as is present here. The decision turned on (1) the fact of the Attorney General's appearance and conduct of the cause, (2) coupled with the fact that he was authorized under state statutes to appear in behalf of the private parties in view of the interest of the state. And both of these factors are present in the Dollar litigation (for the second, see pp. 34-36, infra).

The Supreme Court has always so regarded the *Gunter* case, as is shown by the passage from *Vail v. Arizona,* 207 U.S. 201, quoted at page 66, infra.

In *Sunshine Coal Co. v. Adkins,* 310 U.S. 381, the Supreme Court held that the United States was bound by a judgment in a suit in which officers of the United States appeared with authority to represent its interests. It said (p. 403):

> "The crucial point is whether or not in the earlier litigation the representative of the United States had authority to represent its interests in a final adjudication of the issue in controversy. Cf. *Gunter v. Atlantic Coast R. Co.,* 200 U.S. 273, 284-289."

Appellant tries to distinguish this case by saying (Br. 32) that Congress had authorized the Bituminous Coal Commission, the party of record in the first suit, to represent the United States. By reason of the basic principles upon which *Dollar v. Land* proceeded, the named defendants, i.e., Land and the other members of the Maritime Commission were not representatives of the United States with authority to represent it within the meaning of this passage. But that is not the crucial point. The crucial fact

is that *the Attorney General and the Department of Justice under his direction* certainly were authorized representatives of the United States to do so. And, when in earlier litigation, authorized representatives of the United States, whoever they are, have appeared, it is bound, though never a party of record. The citation of the *Gunter* case in the *Sunshine* opinion so shows.

The essence of the issue, then, is whether the Attorney General of the United States had statutory power to appear in the name of the nominal defendants in Dollar v. Land and conduct the litigation. At pages 34-36, infra, we show that he had.

In *Hill v. Wallace,* 259 U.S. 44, 63, the Court held that where the Department of Justice appears and argues a case, the decision has binding consequences with respect to the United States, though it is not a formal party.

In *New Orleans v. Gaines' Administrator,* 138 U.S. 595, the principle of collateral estoppel was applied to a city government. In prior suits the plaintiffs had recovered judgment for property against those in possession, who had purchased the property from the City of New Orleans, the City assuming the defense by its counsel. The court said:

> "The judgments were binding on the parties to them, and therefore were binding upon the city of New Orleans, which in most cases had assumed the defense of the suits, and had been represented by counsel therein. We supposed that it was right and proper to consider litigation as at an end in those suits, and that the judgments had passed into *res adjudicata.*" (138 U.S. at 607)

In *Richardson v. Fajardo Sugar Co.,* 241 U.S. 44, suit was brought against the Treasurer of Porto Rico. The Attorney General of Porto Rico appeared on his behalf, filed an answer to the complaint, stipulated to trial, etc. Later he raised the defense that the suit was really one against Porto Rico, a sovereign. The court held, as stated in the headnote, that in view of "the solemn appearance of, and the taking of other steps by, the Attorney General," "the government could not deny the jurisdiction," citing *Gunter v. Atlantic Line,* supra.

WHEN THE SUPREME COURT DECIDED IN 1947 THAT DOLLAR V. LAND COULD BE MAINTAINED, THE ATTORNEY GENERAL WAS PUT TO HIS CHOICE, TO STAY IN OR TO GO OUT.

The crucial point at which the Attorney General had to make an election was when the Supreme Court in 1947 decided in *Land v. Dollar* that the case could be maintained.

To repeat what we have said, the defense of the case by the Attorney General up to that time could have had no special significance, since the sole issue raised up to that point was whether the case could be maintained at all. Until then he was in the cause "only to protest against the exercise of jurisdiction by the court" (*Clark v. Barnard,* 108 U.S. 436, 448). It being decided that it could, thereafter the case proceeded on its merits. Being overruled on that protest, the Department of Justice should have stepped out, if it did not desire the United States to be bound by the eventual judgment. It did not do so.*

And *Porto Rico v. Ramos,* 232 U.S. 627 shows that the Attorney General had to make his choice at that juncture. He could step out of the case or, deciding that the interests of the United States were better served by handling the defense on the merits, he could stay in. Since he chose the latter course, the judgmnt binds the United States. In the *Ramos* case, Porto Rico was held bound where the Attorney General decided to step into an action in ejectment, involving the right of certain individuals to possession of property coming to Porto Rico by escheat. As the court said (p. 631):

> "If held in wrong by them, it was held in wrong by it, and the Attorney General may have considered it well worth while to face the controversy rather than remit it to some other proceeding that the plaintiff might institute, fortified, perhaps, by a decision in his favor. *United States v. Lee,* 106 U.S. 196 * * *.

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*The United States is bound by election, like anyone else. *United States v. Oregon Lumber Co.,* 260 U.S. 290, 301; *United States v. Brown,* 86 F.2d 798 (6 Cir.). The doctrine of election has "for its underlying basis the maxim which forbids that one shall be twice vexed for one and the same cause," *United States v. Oregon Lumber Co.,* supra.

> "* * * the immunity of sovereignty from suit without its consent cannot be carried so far as to permit it to reverse the action invoked by it and to come in and go out of court at its will, the other party having no right of resistance to either step."

And so here. In the language of the *Ramos* case if the stock was "held in wrong" by the Maritime Commissioners, "it was held in wrong by it," the United States. The Attorney General could have left the individual defendants to defend the suit on their own. Had he done so, the judgment would not bind the United States. But he apparently felt that on their own those defendants would not present the kind of case that could be put up by the Department of Justice, armed with the Treasury of the United States, the manpower of the Department of Justice, and the investigative resources of the FBI.

Probably he had an overweening confidence that he could defeat the Dollars. Possibly he felt that a judgment against Land, et al. would give some advantages to the Dollars in any subsequent litigation with the United States. He therefore preferred to come in. The Attorney General of the United States could have stayed out—or come in. He came in, hoping to win the case and benefit the United States by a victory. The United States cannot escape the consequences of his defeat. The law cannot give its sanction to a 'heads I win, tails I do not lose" attitude.

As said in 65 Harvard Law Review about this very matter (477):

> "If the private litigant must cope with the powerful litigation forces of the United States, he should derive some benefit from his effort. Since the Government could ignore the suit and later sue to repossess the property, its voluntary participation should constitute at least the partial waiver of immunity achieved by applying collateral estoppel."

A similar idea is expressed by Mr. Justice Douglas in *Joint Anti-Fascist Refugee Committee v. McGrath,* 341 U.S. 123, 177:

> "When the Government becomes the moving party and levels

> its great powers against the citizen, it should be held to the same standards of fair dealing as we prescribe for other legal contests. To let the Government adopt such lesser ones as suits the convenience of its officers is to start down the totalitarian path."

In *United States v. Ring Constr. Corp.,* 96 F. Supp. 762, 769, the court notes:

> "The principle of res adjudicata necessarily is predicated upon the hypothesis that substance, not form, controls. For otherwise the rule's inherent purpose to end litigation would itself be form rather than substance and the rule would not serve the useful ends at which it is aimed."*

Appellant's failure to note the obvious distinction between the Attorney General's handling of the case until the jurisdictional issue was settled and his handling of the case on the merits thereafter vitiates a bulk of its citations. Cases where the United States appears by its Attorney General to assert that the suit is one against the sovereign and therefore cannot be maintained are simply irrelevant. In such cases the Attorney General was in the case "to protest against the exercise of jurisdiction by the court" (see p. 21, supra). In none of them did he appear in the name of the individuals on the merits after the defense of sovereign immunity was overruled by the highest court to which it could go. In this class fall *Minnesota v. United States,* 305 U.S. 382; *Larson v. Domestic & Foreign Commerce Co.,* 337 U.S. 682; *Scranton v. Wheeler,* 179 U.S. 141; *Stanley v. Schwalby,* 162 U.S. 255; *Belknap v. Schild,* 161 U.S. 10, and *United States v. Lee,* 106 U.S. 196. Thus in the *Minnesota* case the United States was joined as a defendant and moved to dismiss on the ground that it could not be sued and that it was an indispensable party. The Attorney General did not appear for the other defendants, he stayed in the case only because his motion was overruled, and he obtained reversal in the Supreme Court on the ground that the motion

*In that case the principles were applied against a private litigant and in favor of the government.

should have been granted. In the *Larson* case, the plea of sovereign immunity was sustained in the trial court and affirmed, and that was the only issue presented. In the *Stanley* case, the defense of sovereign immunity was raised, overruled below, pressed and sustained above. The *Belknap* case is similar.

Dollar v. Land was just such a case up to the time that the Supreme Court held that the suit could be maintained against the individuals. *It then became a different kind of case so far as participation and control by the Department of Justice are concerned.*

D. The Attorney General Had Statutory Authority to Handle the Case and in Doing So He Represented the Interests of the United States.

Appellant assigns no reason in morals or justice why a different rule should apply to the United States than to a private litigant. In the last analysis it takes refuge in the "doctrine of sovereign immunity". *But to invoke that doctrine is to beg the question.* If that doctrine has the remotest bearing, it is obvious that the sovereign may waive its immunity. If it comes into the court as an actor, it subjects itself to the court's jurisdiction, and it may do so in other ways.

The crucial question, then, is the simple one whether the Attorney General had statutory power to control the litigation and to use the whole law machinery of the United States for the purpose. As said in 65 Harvard Law Review at 477:

> "Certainly if the Attorney General had authority to come into the case in his official capacity the United States should be barred", citing the *Gunter* case, supra.

The answer is that *he had the power.* What he did he was doing under full authority of the law. His conduct of *Dollar v. Land,* the large expenditure of money involved, and the use of services of employees paid by the taxpayers *would have been a gross squandering of public funds on behalf of private litigants,* unless he acted under such authority.

That authority is found in 5 U.S.C., Sec. 309, 316.*

It is the Attorney General "who is customarily charged with representing the Government's interests in court," *United States v. Allied Corp.,* 341 U.S. 1, 5.

It is not necessary for the Attorney General to intervene formally in the name of the United States in order to present its interests and control the litigation. "Regardless of captions, the issue in these cases could not change and the real party-in-interest * * * has always been the same", *United States v. Allied Corp.,* supra, at 5. As stated in *Booth v. Fletcher,* 101 F.2d 676, 681 (D.C. Cir.):

> "The law provides that the Attorney General, *whenever he deems it for the interest of the United States,* may, in person, conduct and argue any case in any court of the United States in which the United States is interested, or may direct the Solicitor General or any officer of the Department of Justice to do so. It does not limit his participation or the participation of his representative to cases in which the United States is a party; it does not direct how he shall participate in such cases; it gives him broad, general powers intended *to safeguard the interests of the United States in any case,* and in any court in the United States, whenever in his opinion those interests may be jeopardized."

Under the statutes cited, the Attorney General has broad power to conduct and to control litigation "in order to establish and

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*"§ 309. *Conduct and argument of cases by Attorney General and Solicitor General.* Except when the Attorney General in particular cases otherwise directs, the Attorney General and Solicitor General shall conduct and argue suits and writs of error and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested, and the Attorney General may, whenever he deems it for the interest of the United States, either in person conduct and argue any case in any court of the United States in which the United States is interested, or may direct the Solicitor General or any officer of the Department of Justice to do so."

"§ 316. *Interest of United States in pending suits.* The Solicitor General, or any officer of the Department of Justice, may be sent by the Attorney General to any State or district in the United States to attend to the interests of the United States in any suit pending in any of the courts of the United States, or in the courts of any State, or to attend to any other interest of the United States."

safeguard government rights and properties." Cf. *Tidelands Oil* case, *United States v. California,* 332 U.S. 19, 26-28. To this end he may intervene in actions against others to assert claims of the United States. *New York v. New Jersey,* 256 U.S. 296, 308; *United States v. Bank of New York,* 296 U.S. 463.

He is the officer in charge of "litigation necessary to establish the rights of the government," but he has no right to use his office and its resources for private interests. *San Jacinto Tin Co. v. United States,* 125 U.S. 273, at 279, 283, and see 305.

NO QUESTION IS INVOLVED OF THE POWER OF THE ATTORNEY GENERAL TO WAIVE IMMUNITY OF THE SOVEREIGN FROM SUIT

Appellant argues that the Attorney General has no authority to waive the government's immunity from suit. At page 27, supra we showed that argument to be pointless when we noted that the Supreme Court in the *Candelaria* and *Drummond* cases drew no distinction between cases where the Attorney General appeared for plaintiff and where he appeared for defendant.

The same argument was made and rejected by the Supreme Court in the case just cited, *United States v. Bank of New York,* 296 U.S. 463. In that case it was held that the United States was precluded from maintaining an independent suit in a United States District Court to assert a claim to certain funds because proceedings to dispose of the funds were already pending in a New York State court. It was held that the only recourse of the United States was to intervene in the state proceedings. The government argued that to require it to intervene meant that the United States would be compelled to become a defendant without its consent. The argument was rejected (p. 480):

> "In intervening for the presentation of its claim, the United States would be an actor—voluntarily asserting what it deemed to be its rights—and not a defendant."

In *Clark v. Barnard,* 108 U.S. 436, in a suit against the Treasurer of Rhode Island (not the State of Rhode Island), the defendant demurred that the suit was against the state. Thereafter

the same attorneys filed a claim to funds in the registry of the court in the name of the State, asserting it to be without prejudice to the demurrer. This Court held that the voluntary appearance and assertion of the claim was an intervention by the State as claimant and as an actor, and that therefore the State was bound (pp. 445, 448). It had become necessary to "adjudicate the adverse rights of the State and the appellees to the fund". Precisely that was necessary in *Dollar v. Land,* and the claim of the United States was being presented by its authorized agent, the Attorney General.

The Attorney General, had he wished, could have intervened in *Dollar v. Land,* in the name of the United States, either in the District Court or in the Court of Appeals (see p. 36, supra). Had he done so the United States would, of course, be bound.

Appellant, in effect, concedes that this is so, because it tries to evade cases like *Clark v. Barnard* by saying (p. 32) that the United States never sought to be made a party to the District of Columbia litigation. But *it is what one does, not what he calls his action, that controls.* If one appears in a cause, he is bound. "It must be recognized that a person can 'appear' so as to be bound by a decree of the court without an order of intervention." *Andrews v. Andrews and Andrews, Inc.,* 42 F. Supp. 5; 6 Cyc. Fed. Proc. (2d ed. 1943), p. 515, Section 2408. This applies to the United States. *In re Read-York Inc., United States v. Davies,* 152 F.2d 313 (7 Cir.).

In *United States v. Guaranty Trust Co.,* 76 F.2d 747 (2 Cir.), trustees of a spendthrift trust refusing to turn over certain incomes to a beneficiary, he applied to the state Surrogate court to compel them. Although the United States was not served, an Assistant United States Attorney filed an affidavit and brief in opposition, requesting the Surrogate to order the income to be used to pay taxes due the United States. The Surrogate held that the income could not be reached for taxes. Thereupon the United States sued in the federal court to compel the trustees to pay the taxes. The bill was dismissed on the ground that the United States was bound by the Surrogate's decree.

In *United States v. Jacobs,* 100 F. Supp. 189, after Jacobs had recovered a personal injury judgment in a state court against a railroad, the latter paid the money to the Clerk. The Railroad Retirement Board, an agency of the United States, notified the Clerk that it claimed a lien on the money, and the Clerk sued in interpleader in the state court. The United States Attorney filed an answer setting up the Board's claim to the fund. The state court dismissed the bill in interpleader on the ground that the Board was not a bona fide claimant, and the Board's appeal was dismissed by the State Supreme Court. Thereupon the United States sued in the federal court, joining Jacobs, the Clerk of the state court, and the railroad, asserting the same claim. The court dismissed the action on motion for summary judgment, as foreclosed by estoppel by judgment, citing *United States v. Guaranty Trust Co.,* supra. It said:

> "To avoid the application of res judicata, plaintiff relies heavily upon the hoary axioms of the law that the United States cannot be sued without their consent; that their sovereign immunity can be waived only by Act of Congress; that the United States Attorney cannot waive their sovereign immunity in the absence of an Act of Congress; and that no Act of Congress waives the immunity of the Railroad Retirement Board from suit in the State Court."*

Noting that

> " 'when the sovereign sues, he brings with him no privileges which exempt him from the common fare of suitors,' "

the court said:

> "However, that which was done was the equivalent of a voluntary intervention to enforce the right of the United States to such funds. That the United States have a right to bring suit by their attorney in courts of the several states to enforce their contracts and protect their property without special statutory sanction is not open to doubt."

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*The United States cited the cases it cites here, including *Carr v. United States,* 98 U.S. 433; *Minnesota v. United States,* 305 U.S. 382; *United States v. Lee,* 106 U.S. 196; *Stanley v. Schwalby,* 162 U.S. 255.

Appellant argues that in *Dollar v. Land,* the United States did not appear "formally or informally" (p. 32). By this it can only mean that it did not appear "eo nomine."

But this argument at once shows that the reliance on sovereign immunity is a sham and begs the question. The doctrine of collateral estoppel teaches that one need not be a party to a cause, eo nomine, in order to be bound:—he is bound if he controls and conducts the litigation. And it is of no consequence at all that the Attorney General has not appeared for the United States, eo nomine. *Gunter v. Atlantic Coast Line Railroad Company,* 200 U.S. 273; *Drummond v. United States,* 324 U.S. 316, 318. The only possible limitation on the application to the United States of the doctrine of collateral estoppel would be that the United States cannot thereby be bound where it would not be bound if it did appear eo nomine.

The moment it is conceded—as it must be—that the Attorney General could have formally intervened in *Dollar v. Land* in the name of the United States to assert its title, it follows that it is bound, if the other facts are such as to make the doctrine of collateral estoppel applicable, as they here are.

What is important are the substantive realities, not names or labels. As said in *Chicago, R. I. & P. Ry. Co. v. Schendel,* 270 U.S. 611, 620, "Identity of parties is not a mere matter of form, but of substance * * * parties nominally different may be in legal effect, the same."*

APPELLANT'S CASES RE WAIVER OF IMMUNITY

Appellant's citations that the Attorney General may not waive sovereign immunity from suit are not in point. Where the Attorney General asserts title in the United States, the court is not

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*In our belief the United States did intervene in the cause in its own name. See p. 45, infra. If it did, the doctrine of *res judicata* applies. If it did not, the doctrine of collateral estoppel applies. See p. 19, supra. In footnote 26 on p, 23, appellant's brief refers to a statement in *Land v. Dollar,* 188 F.2d 629, 632. That pertains to the question of appearance *eo nomine.*

restricted to holding that the claim of the United States is invalid. It may quiet title in the defendant against the United States. See *United States v. Utah,* 283 U.S. 64 at 90, decree quoted at 283 U.S. 801.* The underlying principle is that when the United States, by any authorized representative (e.g., Attorney General), presents a "subject matter" to the court, the court may adjudicate that subject matter, and the adjudication binds the government. The doctrine of sovereign immunity stands aside.

Thus in *The Thekla,* 266 U.S. 328, the court (per Holmes, J.) pointed out (p. 339-341):

> "When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done *with regard to the subject matter.* * * *
>
> "* * * the reasons are strong for not obstructing the application of natural justice against the Government by technical formulas when justice can be done without endangering any public interest. * * * It is said that there is no statute by which the Government accepted this liability. It joined in the suit, and that carried with it the acceptance of whatever liability the courts may decide to be reasonably incident to that act."

Appellant's citations such as *United States v. United States Fidelity Co.,* 309 U.S. 506; *United States v. Shaw,* 309 U.S. 495, are cases where money judgments were sought against the United States. It was held that the fact that the United States asserted a money claim against the private party would have permitted adjudication against it of a counterclaim to the extent necessary to offset the claim of the United States, but not judgment on a cross-complaint in excess of that amount. In *The Thekla* the United States intervened in admiralty and was held bound to a

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*In *Jones v. Watts,* 142 F.2d 575 (5 Cir.), the court said:
"It is well settled that when government invokes the aid of the court as a litigant it stands as any other litigant, with the same obligation to give effect to the rights of the person sued. It cannot ask the court to render a judgment or to enforce it without submitting itself to do justice." (p. 577)

decree against it for damages. In *United States v. Shaw* the Supreme Court said that in admiralty the "subject matter" was the collision itself. *The Thekla* was approved as to the "subject matter" doctrine, but it was held that the "subject matter" of a claim for money at law does not comprise excess cross-complaints. That limitation has no relevance here. The case of money claims is wholly different than contests over the right to property. The assertion by A of a right in property against B necessarily permits a court to hold that B's rights are superior to A's.*

CASES WHERE THE DEPARTMENT OF JUSTICE IS AUTHORIZED BY STATUTE TO FURNISH LEGAL SERVICES TO PROTECT A PRIVATE INTEREST ARE NOT IN POINT.

By its selection of cases to cite appellant shows that it is not confronting the precise issue here involved or the kind of facts on which it is based.

The principle we invoke, as stated in the *Souffront* case and the *Restatement of Judgments,* is that one who is not a party of record is nevertheless bound by the decision of the issue litigated if he prosecutes or defends the suit in the name of a party to establish and protect his own right or in aid of some interest of his own.

Now there are situations where Congress has authorized a United States attorney to appear and represent the interests of

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**Munro v. United States,* 303 U.S. 36 was a suit for a money judgment against the United States. The position of the United States was purely that of a defendant and in no wise that of an actor.

In *Minnesota v. United States,* 305 U.S. 382, suit was brought in a state court to condemn a right of way across Indian lands. The United States was an indispensable party to such a suit and was named as a defendant. The United States Attorney removed the cause to the federal court and then moved to dismiss it for lack of jurisdiction over the United States. The District Court denied the motion because of a statute which permitted condemnation suits over Indian lands. The Supreme Court held that the statutory consent was to the maintenance of such suits in federal courts only, not to the institution of such a suit in the state court. And the jurisdiction of a federal court in a removed action is no greater than jurisdiction of the state court itself.

private litigants. An example is the representation of returned veterans to obtain their former jobs under the old Soldiers' and Sailors' Relief Act (Title 50 U.S.C. App. Sec. 308(e)) and the Universal Military Training and Service Act (50 U.S.C. App. Sec. 459d). In such cases, the fact that the United States Attorney has been in the case does not bind the United States, for no property interest of its own is involved, and the attorney has appeared under authority to protect a private interest and not that of the United States.

Such a case is *Goddard v. Frazier,* 156 F.2d 938, cited by appellant (Br. 28) to avoid the *Candelaria* and *Drummond* cases. There the United States Attorney had appeared in private litigation to represent an Indian. He did so, *not* under authority of law to protect the interests of the United States, but under authority of a special statute authorizing him to appear for the Indian.

The Tax Collector cases cited by appellant (Br. 23) are of the same character. The leading one is *Sage v. United States,* 250 U.S. 33, and their history, rationale and peculiarities as part of the fiscal system are summed up in *United States v. Nunnally Investment Co.,* 316 U.S. 258.

In *Sunshine Coal Co. v. Adkins,* 310 U.S. 381 at 403, the court, citing the *Sage* case, states that these tax collector cases are not in point. The *Sage* case in turn points out (250 U.S. at 37) that those cases do "not concern property in which the United States asserts an interest." Government attorneys appear for tax collectors *not* under authority of statute empowering the Attorney General to protect and enforce the interests of the United States but under authority of a special statute authorizing United States Attorneys to defend the private litigant (28 U.S.C., Sec. 507(a)(3)). Historically, the tax collector is personally liable for unlawful exactions. He pays the judgment out of his own pocket, except so far as Congress sees fit to have the Treasury protect him.

In the *Sunshine* case, supra, the court contrasts the *Sage* and like cases with *Gunter v. Atlantic Coast Line Ry. Co.,* 200 U.S. 273 (discussed supra, p. 28).

Contrast *Land v. Dollar* with the tax cases. Here the Attorney General had no authority from any statute to defend the defendants *as individuals.* His authority to act was the general statute empowering him to protect the interests of the United States (see p. 35, supra). It was the alleged title of the United States which he sought to protect, and on that basis he asked judgment against the Dollars.

Appellant tries to justify the Attorney General's conduct of the litigation in *Dollar v. Land* on a different basis (Br. 26). It argues, in effect, that unless the Attorney General defends suits brought against officers, the officers would have to do so out of their own pocket. But if the Attorney General should refuse to defend, and thus stand on the rule that by staying out of the case the United States remains aloof from an adverse judgment, the individual officer may refuse to defend at his own expense, for he has no personal interest and the outcome is of no personal concern. If he persists in maintaining the defense, where the Attorney General declines to take over, he is persisting in a purely personal tort. If it be argued that thereby he would fail to protect the interests of the United States fully, that argument at once concedes that it is the latter's interests and not that of the individual that the Attorney General really asserts. If, as said in *Porto Rico v. Ramos,* 232 U.S. 627, the Attorney General decides that the interests of the United States are better protected by coming in and defending, *why should it not be bound? It has had its day in court.* The case is like patent infringement cases. If a suit is brought against a small merchant who has bought a few articles from a manufacturer, the manufacturer may decline to defend the suit and will not be bound by the judgment.

The Attorney General was not handling Dollar v. Land merely to give a lawyer to the individual defendants. He handled it in order to assert title of the United States. Otherwise he was acting illegally in using his office and its resources. *San Jacinto Tin Co. v. United States,* 125 U.S. 273, 279, 305.

Common sense reality is shown by the statements of the attorneys of the Department of Justice quoted above (pp. 14, 15,

supra). In no other way can the action of the government counsel be explained.

ACTION OF THE ATTORNEY GENERAL AFTER DECISION ON THE MERITS

For example, after the decision of the Court of Appeals in July 1950, *Dollar v. Land,* 184 F.2d 245, and denial of certiorari in November 1950, 340 U.S. 884, and after the filing of the mandate in the District Court, the following occurred:*

On December 7, 1950, the Attorney General opposed entry of judgment under the mandate, in the name of the Secretary of Commerce, Mr. Sawyer. In the name of the Secretary he stated the objection that he had been directed by the President to hold the stock and "to take all appropriate action to assert and maintain the government's rights as owner of the stock" (Supp. Tr. 9, 10). Attached to his opposition was copy of a letter to him from the President, directing him to "assert and maintain the Government's rights" (Supp. Tr. 11).

Concurrently, the Attorney General, in the name of the defendants, objected to the entry of a judgment, even against the Secretary of Commerce, on the ground that the Secretary of Commerce "is the official custodian of this stock for the United States", asserting that "possession of said stock and title thereto are in the United States", and that "Charles Sawyer as Secretary of Commerce has been directed by the President of the United States to continue to hold the stock on behalf of the United States and to take all appropriate action to assert and maintain the Government's rights as owner of this stock" (Supp. Tr. 5-7).

Then judgment was entered for the Dollars on December 11, 1950, over these objections—a judgment that imposed no personal liability for damages on defendants. Thereupon the Attorney General, in the name of the United States, *eo nomine,* and of Mr. Sawyer, as Secretary of Commerce, filed motions to vacate the judgment (Supp. Tr. 44, 45).

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*The facts are shown by the Supplemental Transcript of Record in the Supreme Court, No. 552. That is part of the record herein. See p. 9, supra.

From the denial of this motion, and from the judgment, the Attorney General appealed, in the name of the United States, in the name of Mr. Sawyer, and also in the name of the defendants, protesting that the judgment quieted title against the world (Supp. Tr. 47, 48).*

In all these activities the United States and Mr. Sawyer were represented by identically the same counsel as the nominal defendants, i.e., the same attorneys in the Department of Justice.

Obviously, the question whether the judgment quieted title or merely directed transfer of possession was of no concern to the defendants, as individuals. It was already adjudicated that they had no right to retain possession, and, if the decree went further, it did not aggrieve them in any personal capacity.

Again, after the appeal was dismissed on January 31, 1951 with direction for entry of a judgment *in haec verba* (188 F.2d 629), and after judgment was entered against Mr. Sawyer as successor of the defendants, the Attorney General appealed again, this time using the names of defendants Land, et al. as well as that of Sawyer (R. 190, Admitted, R. 244, 254).

It is inescapable that defendants were mere "lay figures" used by the Attorney General for his purposes to assert the government's title.†

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*Transcript in No. 552, pp. 20, 21. This is also part of the record herein (see p. 9, supra).

†*Res judicata:* We believe that what was done after November 13, 1950 by the Attorney General, in appearing in the names of the United States and of Mr. Sawyer, made the United States party to the suit and resulted in its being bound by *res judicata.* It is not, however, necessary to argue that point, because the collateral estoppel is clear, and it is sufficient.

The basis of our belief as to *res judicata,* as distinguished from collateral estoppel, may be summarized. The activity in the names of the United States and of Mr. Sawyer, as Secretary of Commerce, was the equivalent of an intervention. One can appear so as to be bound without a formal order of intervention (p. 37, supra). A motion to vacate a judgment is itself a general appearance. *Feldman Investment Co. v. Connecticut General Life Insurance Co.* (10 Cir.), 78 F.2d 838 at 841 (2d col.); *Slocum v. Edwards* (2 Cir.), 168 F.2d 627 at 631 (2d col. body). This applies to the United States. *In re Read-York, Inc.,* 152 F.2d 313

E. The Cases on Which Appellant Relies Do Not Support It.

We have already commented on the cases cited by appellant in discussing the subject on principle (pp. 39-43, supra) and we have noted that cases involving appearance by government attorneys prior to final determination of the jurisdictional question whether a suit is one against the United States are irrelevant (p. 33, supra).

We now turn to the other cases which appellant cites as direct authority.

The case principally relied on is *Carr v. United States,* 98 U.S. 433, decided in 1878. It was there held that judgment in a prior suit against government officials, for possession of property, was

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(7 Cir.). And where one intervenues he is bound by the record as it stands at the time. The rule applies to the government. As said in *State of Kansas v. Occidental Life Ins. Co.,* 95 F.2d 935 (10 Cir.) at 936:

> "One cannot voluntarily intervene after an appeal and then be heard to litigate anew questions determined on the appeal [citations omitted]."

See also *Galbreath v. Metropolitan Trust Co.,* 134 F.2d 569, 570 (10 Cir.); *Godfrey L. Cabot, Inc. v. Binney & Smith Co.,* 46 F. Supp. 346. And see 39 *Am. Jur.* 950, Sec. 79; 67 *C.J.S.* 1010 and 1011, Section 70; *Allen v. California Water and Telephone Co.,* 187 Pac.2d 393, 31 Cal. 2d 104. One who appears, after judgment, by motion to vacate it is just as bound by it as if he had originally appeared and participated in the trial. *Richardson v. First National Bank of Seminole,* 186 Okla. 203, 97 Pac.2d 39 at 40 (2d col.).

The opposition to entry of judgment, motions to vacate, and the appeals were labeled "special appearances." But one does not prevent his appearance from being general by calling it special. *Davis v. Davis,* 305 U.S. 32, 42. *Jos. Riedel Glass Works, Inc. v. Keegan,* 43 F. Supp. 153, 159 (para. 6). If one appears in order to assert rights, he becomes an actor, he has submitted to the jurisdiction of the court, and he "must take the consequences." *Merchants Heat & L. Co. v. Clow & Sons,* 204 U.S. 286 at 290 (Holmes, J.); *Davis v. Davis,* supra.

If the motions to vacate had been confined to jurisdictional grounds, a different question would be presented. But they were not so confined. They sought affirmative relief. If the judgment did not bind the United States, it was unnecessary for it to move to vacate. Nor did it stop with some motion confined to its own alleged rights. It moved to vacate the judgment generally, even as to the named defendants (Supp. Tr. 44).

The only purpose of Mr. Sawyer's opposition to entry of judgment and of his motion and that of the United States to vacate was to prevent the Dollars from securing the possession to which that judgment entitled them, and the means of doing so was the assertion of superior title in the United States.

void on the ground that it was a suit against the sovereign, the court losing jurisdiction the moment defendants asserted title in the government (p. 438). But *United States v. Lee,* 106 U.S. 196, expressly overruled the *Carr* case (p. 216). Appellant admits that it did so, but argues that the part of the *Carr* case so overruled was mere dictum (Br. 19, fn. 15). On the contrary, it was the heart of the decision.

In fact, the *Carr* case rests on a basic outlook that has been completely overruled. Thus, in stating the rationale of its decision, the court said (p. 438), "Otherwise, the government could always be compelled to come into court and litigate with private parties in defense of its property." Yet in *United States v. Bank of New York,* 296 U.S. 463, this very argument was swept aside as unsound. As already noted (p. 36, supra), it was there held that the United States was precluded from bringing an independent suit to assert a claim to certain funds, by reason of the pendency of a prior action in a New York State court concerning disposition of those funds. The Supreme Court held that the only recourse of the United States was to intervene. In so holding, the Supreme Court was unimpressed by the government's argument that to so hold

> "would compel the United States, as the only means of asserting its right to this particular property, to enter its appearance in the pending actions in the state court" and that "So to limit the rights of the United States is in practical effect to subject the United States to suits without its consent." (p. 466)

Appellant notes that in the *Carr* case reference was made to the fact that in the earlier suit an attorney "was employed and paid by the Secretary of the Treasury" to represent defendants and that "the person who was district attorney of the United States for the district of California at the time" also appeared as attorney for the defendants.

However, there is no statutory authority for the Secretary of the Treasury to employ attorneys in behalf of the United States. His situation is unlike that of the Attorney General, who does have

statutory power, as we have shown (p. 35, supra). The Secretary of the Treasury has none. Similarly, district attorneys acting on their own initiative, or at the request of anyone other than the Department of Justice, have no such power. The power to appear and assert the interests of the United States is vested by law in the Attorney General and those acting under his direction.

Thus the facts of the *Carr* case are wholly unlike the facts of the present litigation.

Moreover, the argument made in the *Carr* case that the United States was concluded by the prior judgment was not based on *collateral estoppel*—a doctrine then hardly in existence—but a different principle, namely, "that where a tenant or other person in privity with the landlord, is sued, and notifies the landlord to defend, the landlord is bound by the judgment pronounced in the action" (98 U.S. at 437). The court held that rule inapplicable.

Despite the fact that *United States v. Lee,* supra, overruled the *Carr* case, appellant argues that the *Lee* case is authority against us as to effect of representation by attorneys acting under direction of the Attorney General. We submit that the *Lee* case is not authority for appellant.* As we have seen (p. 25), the *Lee* case clearly conceived that the right of the United States to relitigate a case is the same as that of any private party, no more, no less. The *Lee* case then stated the rule of *res judicata* in its simplest form, that where one is not a party to a cause, he is not bound by the judgment. That simple statement is certainly no longer a complete or exact statement of the law as respects the various situations in which a judgment may bind one. And, of course, the court in the *Lee* case was not endeavoring to lay down the bounds of collateral developments more or less related to *res judicata* or to freeze the law as respects the United States while leaving it free to grow as respects all others.†

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*The passages from the *Lee* case quoted by appellant (Br. 21) pertain to the effect of the defendants' being officials of the United States.

†The Supreme Court has frequently quoted or referred to the "oft repeated admonition of Chief Justice Marshall" in *Cohens v. Virginia,* 6

The *Lee* case was decided in 1882, and, as already noted, not until 1910 did the Supreme Court definitively state the rules of collateral estoppel, in the *Souffront* case; and the *Candelaria* case was not decided until 1926, or the *Drummond* case until 1944.*

If the early cases of *Carr* and *Lee* could be deemed to lend support to appellant's argument, then it could be said, in the words of 65 Harvard Law Review at 477:

> "Certain older cases, using broad language to the effect that Government officials cannot waive the immunity of the sovereign, did hold that a judgment in such a case could not prevent the United States from relitigating the issues. More recently, however, the Supreme Court in *Drummond v. United States,* has indicated its support of the fairer rule that when counsel have been employed to represent the interest of the United States, the Government is bound by the determined issues.
>
> "A distinction can validly be drawn here between applying merger or bar to the Government and applying collateral estoppel. In the latter case, if the Government presents new issues it may be heard. Absent such untried issues, the Government should not have a second day in court, a privilege denied to the private litigant."

Wheat. 264, that language used when the court was concentrating on one problem is not to be over-extended to a case where it is dealing with another. E.g., *Wright v. United States,* 302 U.S. 583 at 593; *Osaka Shosen Line v. United States,* 300 U.S. 98 at 103; *Humphrey's Executor v. United States,* 295 U.S. 602, 627. Chief Justice Marshall's famous statement was this:

> "it is a maxim, not to be disregarded, that general expressions, in every opinion, are to be taken in connection with the case in which those expressions are used. If they go beyond the case, they may be respected, but ought not to control the judgment in a subsequent suit, when the very point is presented for decision. The reason of this maxim is obvious. The question actually before the Court is investigated with care, and considered in its full extent. Other principles which may serve to illustrate it, are considered in their relation to the case decided, but their possible bearing on all other cases is seldom completely investigated." (6 Wheat. at 399).

*Appellant (Br. 30) quotes from Freeman on Judgments. But Freeman was published in 1925, one year before the *Candelaria* case.

And one may also repeat what was said in *American Propellor & Mfg. Co. v. United States,* 300 U.S. 475, 478:

> "We have said * * * 'When the United States comes into Court to assert a claim it so far takes the position of a private suitor as to agree by implication that justice may be done with regard to the subject matter. The absence of legal liability in a case where but for its sovereignty it would be liable does not destroy the justice of the claim against it. * * * *The reasons are strong for not obstructing the application of natural justice against the Government by technical formulas* when justice can be done without endangering any public interest.' If the principle thus stated is not strictly applicable, it at least suggests that the court should not affirm what is clearly an unjust and inequitable result unless under plain compulsion of law."

Appellant quotes at length from *Tindal v. Wesley,* 167 U.S. 204. It has nothing to do with the question of the effect of control of litigation by the Attorney General. It merely held that the particular suit was not one against the State of South Carolina, adding that the fact that defendants were state officials would not preclude the state. How defendants were represented nowhere appears.

Nor are other cases cited in point. In *Cunningham v. Macon, etc. R.R. Co.,* 109 U.S. 446, it was held that the suit was one against the state and therefore not maintainable. In *McClellan v. Carland,* 217 U.S. 268, in a suit between private parties in a federal court, the State of South Dakota sought to intervene to assert title, through escheat, paramount to both litigants. Its motion to intervene was denied, but the federal court stayed proceedings to permit the State to sue in its own courts. The sole question before the Supreme Court was whether the stay was properly granted. Holding that it was not, the court remarked (p. 282) that the question of the right of the State to intervene was not before it, "but if not made a party to the suit, its rights would not have been concluded by any adjudication made therein." No question resembling any in our case was present, since the

only issue in the federal court in the absence of the intervention would be the rights of private parties, none of whom asserted title in the State.

Hussey v. United States, 222 U.S. 88, was a suit in the Court of Claims for damages brought under a special enabling act. There had been a prior ejectment suit in a state court. While the effect of the judgment in that action was raised, the litigant did not argue or rely on the doctrine of collateral estoppel, but rested on different arguments, namely, that judgments of state courts with respect to real property have a peculiar conclusiveness and that the scope of the Court of Claims' inquiry was limited by the special act of Congress.*

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*Appellant also cites in a footnote, pp. 22, 23, a number of inferior court decisions. None is in point. *Crane v. United States,* 44 Ct. Cl. 324, is merely the lower court decision in *United States v. Hussey,* supra; and *Scranton v. Wheeler,* 57 Fed. 803, is the lower court decision of the same case in 179 U.S. 141, discussed at p. 33, supra.

In *United States v. McIntosh,* 2 F. Supp. 244, after commencement of an ejectment suit in a state court against a government agent but before that case was tried, the United States sued to quiet title, obtained a preliminary injunction against the maintenance of the state suit (57 F.2d 573) and later obtained a final decree. The state suit never went to judgment; it was stopped in its initial stages. No question of *res judicata* or estoppel by judgment was present because there was no judgment. What the United States there did was the honorable thing. It openly submitted its claim to judicial determination at a first trial, instead of trying to maneuver, as here, so as to gain the benefits of such a trial, if successful, but to escape its consequences if unsuccessful.

In *United States v. Van Horn,* 197 Fed. 611 (Dis. Ct., Colorado, 1912) there is reference to a prior decision in a state court, but it does not appear that the Attorney General had anything to do with it, and that subject is not discussed.

In *Blondet v. Hadley,* 144 F.2d 370, and *Wood v. Phillips,* 50 F.2d 714, the sole question discussed was the jurisdictional one whether the suit was against the government. There is no mention of the effect of a judgment. This jurisdictional issue was the sole one involved in *Correa v. Barbour,* 71 F.2d 9; *Appalachian Electric Power Co. v. Smith,* 67 F.2d 451; and *Stone v. Interstate Natural Gas Co.,* 103 F.2d 544; there are quotations from cases like *United States v. Lee,* supra, but no mention whether prior suits were conducted by the Attorney General or the effect thereof.

ESTOPPEL: THE UNITED STATES IS LIKE ANY OTHER LITIGANT

Doubtless because the term "collateral estoppel" contains the word "estoppel," appellant (Br. fn. 24) asserts that the United States cannot be estopped by acts of its officers. This is not only playing with words, but the rule is not so broad. The rule is merely that the United States may not be estopped by acts of agents in entering into agreements to do what the law does not authorize them to do. As said by Dean Pound, 58 Harvard Law Review 922, 923, "where the federal government or a state goes into a court of equity and seeks relief, when it seeks equity it must do equity and so be subject to the doctrine of estoppel like any other litigant," particularly where, as here, it acts in a proprietary capacity.

We note again the passage quoted at p. 50, supra from *American Propellor & Mfg. Co. v. United States,* 300 U.S. 475. Quoting it, *United States v. Standard Oil Co. of California,* 21 F. Supp. 645, 655 states:

> "With all due regard for the powers and attributes of sovereignty, it is well to remember that, when a sovereign comes into a court of equity seeking its aid to enforce its rights, even as the owner of the public domain, its claim should be tested by the same equitable principles which govern suits between private litigants, unless there be a special statute commanding a contrary rule. [Citations omitted]"

The United States was held by this Court to be estopped in *United States v. Coast Wineries,* 131 F.2d 643, 650. In *Vestal v. Commissioner,* 152 F.2d 132, 136 (D.C. Cir.), it is said that in proper circumstances the doctrine of estoppel does apply to the government, citing numerous cases.*

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*E.g., *United States v. Brown,* 86 F.2d 798 (6 Cir.); *Staten Island etc. v. United States,* 85 F.2d 68 (2 Cir.); *Joseph Eichelberger & Co. v. Commissioner,* 88 F.2d 874; *Ford Motor Co. v. United States,* 9 F. Supp. 590, 604; *Ritter v. United States,* 28 F.2d 265 (3 Cir.): "when the sovereign becomes an actor in a court of justice, its rights must be determined upon those fixed principles of justice which govern between man and man in like situations."; *United States v. Stinson,* 125 Fed. 907: "The substantial considerations underlying the doctrine of estoppel apply to the government as well as to individuals."

In *State of Iowa v. Carr,* 191 Fed. 257, 266 (8 Cir.) (before Sanborn, J., and Van Devanter, J., later a United States Supreme Court Justice), it was said:

> "The equitable claims of a state or of the United States appeal to the conscience of a chancellor with the same, but with no greater or less force than would those of an individual under like circumstances,"

citing numerous authorities, including *Herman on Estoppel,* Sec. 676, 677. Herman states that the principle of non-estoppel as respects the government

> "may be applicable in cases where an officer exceeds his authority or acts without power. But as a general principle applicable in all cases it is directly opposed to the great weight of authority on the subject."

In *United States v. Denver & R. G. W. R. Co.,* 16 F.2d 374 (8 Cir.), the court said (p. 376):

> "The equitable claims of the state or of the United States are no stronger than those of an individual under like circumstances, and a state or the United States may waive a claim and be estopped from the assertion of a claim under circumstances that would estop an individual from the assertion of a similar claim. State of Iowa v. Carr (C.C.A.) 191 F. 257, 266; United States v. Chandler-Dunbar Water Power Co. (C.C.A.) 152 F. 25, 41; United States v. Debell (C.C.A.) 227 F. 775, 779; Rannels v. Rowe (C.C.A.) 145 F. 296, 301; 1 Pom. Eq. Jur. sec. 451."*

F. Neither the Supreme Court Nor Any Other Court Has Held That the Judgment in the District of Columbia Litigation Is Not Binding on the United States.

Lacking support in reason or principle, appellant relies chiefly on the reiterated assertion that the Supreme Court and other courts have held that the judgment in *Dollar v. Land* is not conclusive on the United States.

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*Even in international tribunals, estoppel against the sovereign is recognized. 3 Stanford Law Review 193.

This is not so. To assert it is to attribute to the courts the act of gratuitously deciding matters not briefed, not argued, not submitted, and not involved in the issues before them.

Principally, appellant relies on statements made in 1947 in *Land v. Dollar,* 330 U.S. 731. But, as we have said, the collateral estoppel arose solely by reason of facts thereafter occurring, facts which were not and could not have been before the court, because they were not yet in existence. To avoid repetition we adopt what we said at pp. 20, 21, 31-34, supra.

No more did the Supreme Court pass on the question in *Land v. Dollar,* 341 U.S. 737. What was before it then was a motion to vacate a stay of the contempt judgment of the District of Columbia Court of Appeals, and the suggestion by Mr. Justice Jackson that the end of the term be postponed to permit early argument. The court gave reasons militating against what it termed premature disposition of the issues presented, and in the course thereof it stated, purely by way of an historical recital, what it had said in 330 U.S. 731. It did not decide, it did not even purport to decide, the issues of *res judicata* or *collateral estoppel,* neither of which was before it. In the very next breath it noted that (p. 379)

> "On June 1, 1951, the District Court for the Northern District of California began its hearing on defendants' (respondents in this Court) motion to dismiss the complaint and for summary judgment."

Obviously the court did not purport to rule on that motion or to foreclose it.*

The question whether the judgment would be conclusive against the United States by virtue of the control of the case by the Attor-

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*Appellant's brief (p. 15) also notes that in a separate memorandum, Mr. Justice Frankfurter refers to the fact that the Department of Justice had represented defendants throughout. This is no indication that he thought the fact to be of no significance. The contrary would seem to be true; he prefaced his separate memorandum with a statement why an explanation for granting certiorari was desirable.

ney General is one which has never come before the Supreme Court.*

Appellant states (Br. 14) that throughout the Dollar litigation the Supreme Court and the Court of Appeals for the District of Columbia have been aware that the defendants were being represented by the Department of Justice. A court's awareness of a fact not relevant to any issue before it cannot remotely mean that the court has decided the issue. In 1947, at the time of its opinion in 330 U.S., the facts on which the issue of collateral estoppel arises did not even exist. In 1950 and 1951, when the Court denied certiorari three times, the issue was not involved in the petitions. Nor was it presented in the petitions connected with the contempt proceedings which it granted. Its denials and grants of writs have no significance on the issue.

Appellant (Br. 15) notes that in briefs filed by us in opposition to petitions for certiorari in Nos. 552 and 697 (Oct. Term 1950) and No. 247 (Oct. Term 1951), we mentioned facts upon which the present claim of collateral estoppel rests. From this it apparently argues that thereby the issue was presented and decided. This is patently not so, as a brief review will show.

In No. 552 the government was petitioning for certiorari to review *Land v. Dollar,* 188 F.2d 629, the decision of January 31, 1951. At that time the present suit had not yet even been filed. The petition protested that the judgment was not *res judicata* against the United States. We said in reply that *that question was not before the court,* and, that whether the assertion was true or false, it was irrelevant. We further said that the question could only arise if the Attorney General should institute a new suit in the name of the United States, and that it was in-

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*Appellant's brief (p. 10) also refers to a statement in the Chief Justice's opinion of April 17th where, as a single Justice, he stayed a restraining order issued by the Court of Appeals pending certiorari. The Chief Justice merely purported to give a brief resume of the history of the case. He did not purport to decide the issue of collateral estoppel. As a single justice his authority extended no further than to grant a stay. 28 *U.S.C.* Sec. 2101(f).

conceivable that he would institute such a suit, because to do so would be an act of intransigence and oppression.*

The government's petition in No. 697 related to phases of the order enforcing the judgment and to phases of the contempt proceeding. Our brief in opposition was filed May 10, 1951, before we had filed our answer in the instant cause or our motion for judgment.

The government based its argument on the premise that the judgment was "not *res judicata* against the United States. We replied that were this so, it would be irrelevant to the issue there involved.† And we said that the issue of *res judicata* "will arise

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*What we said was this (p. 17):

"But the petition protests that the determination is not *res judicata* as against the United States. *Whether that is so is not a question now before the court. And whether true or not it is irrelevant.* The statement that the decision is not *res judicata* against the United States means no more than this: if the United States should see fit to bring a suit in its own name against the present plaintiffs to quiet title, it would not be foreclosed *on the threshold* by the present judgment. Yet, as a practical matter, such a suit would be fruitless, for, after all, the issue *has* been tried. More than that: * * * the Attorney General did take charge, and from first to last the case has been tried and conducted by him and those under his supervision. The trial was long, the record exhaustive. All possible evidence was introduced. It was almost entirely stipulated and documentary.

"The admitted facts, which in all honesty would have to be conceded in any new action, would compel judgment for plaintiffs in a new suit as they have in the old. The institution of a new action by the Attorney General, this time in the name of the United States, would be, in the circumstances, an act of intransigeance and oppression, even if technically such a suit would not be barred by the doctrine of *res judicata.*"

Then in a footnote we added:

"If the question of res judicata *should* arise in some proceeding, there are facts which occurred *after the decision in Land v. Dollar,* 330 U.S. 731, which would bear on the question, e.g., the Department of Justice tried and handled the case, a material fact under the principles stated in [authorities omitted] * * *."

†We said (p. 19):

"The argument which petitioners now make rests entirely on the premise that the judgment is not *res judicata* as respects the United States. Were *this so, it would still be utterly irrelevant,* as the court below, in its powerful opinion of April 11, 1951 demonstrates. That opinion proceeds on the assumption that the judgment is not *res judicata* against the United States. Our discussion proceeds on the same assumption, although we believe that the determination that the 1938 contract was a pledge is conclusive against the United States * * *."

in the San Francisco suit when the defense is pleaded, but it has not yet arisen here" (p. 19).* Thereafter the defense was pleaded in the San Francisco suit. Then, for the first time in any court, it became an issue, for the first time, it was fully briefed and argued, and for the first time decided.

The petition for certiorari in No. 247 sought review of the contempt judgment on the ground that it proceeded on the premise that "the District of Columbia * * * litigation adjudicated the rights of the United States to the stock". We said in reply (p. 9), just as we had responded to similar claims in previous petitions, that "the order proceeds on no such premise". We added:

> "Of course, if the basic judgment, which this Court has thrice declined to review, concludes the United States, the ground on which petitioners base their resistance to the judgment disappears. Consequently, should a writ be granted, we shall ask the Court to hold that the United States is concluded on the principles of collateral estoppel."

And we noted that the argument would be based on facts occurring subsequently to *Land v. Dollar,* 330 U.S. 731, adding, "Such facts . . . *have never yet been brought before this Court for consideration.*"

By granting the writ the court did not rule against a contention yet to be briefed and presented and which could be presented only if the writ were granted.†

Appellant would also have it appear that the Court of Appeals for the District of Columbia has held that the judgment in *Dollar v. Land* was not binding on the United States. That is not so. As part of repeated objections, first to the form of judgment and then to its enforcement, the Department of Justice argued that it was

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*In a footnote we said:
"Lest there be any claim *when the issue does arise* that we have acquiesced, we briefly review our position in this footnote."

†Appellant's brief also argues (fn. 14, p. 16) that because the Supreme Court on January 7, 1952 denied our petition for certiorari in the present cause it disapproved of the final decree below. The petition sought certiorari *before* decision by this Court. The denial meant nothing except that the court preferred the case to follow the usual course. If any significance could be attached, it would be that the court approved the judgment.

not binding on the United States. The court's consistent answer was that the objection was pointless, because, assuming the premise to be well taken, the judgment was nevertheless enforceable to give the plaintiffs possession. For example, appellant quotes from *Land v. Dollar,* 190 F.2d 366 (April 11, 1951). There the court, responding to the argument that plaintiffs could not enforce their judgment, referred to what the Supreme Court had said, pointed to *United States v. Lee* as the source of the statement, and then went on to show that under that case plaintiffs were entitled to possession regardless of the claims of the United States.

The court was not purporting to pass on the issue of *res judicata.* It made this doubly clear in its latest opinion (May 18, 1951) (*Land v. Dollar, Sawyer v. Dollar,* 190 F.2d 623, 645, 646) where it said:

> "And it is indisputably true that the claim of the United States to title is immaterial to the claims of Sawyer, et al., respondents in this suit, to possession. Thus, this discussion of the *non res judicata* rule and the impact of the Government's course upon the doctrine of sovereign immunity is *outside the scope of any issue before us."**

The court also pointed out that the issue could only arise *if it should be pleaded by the Dollars in a suit brought against them by the United States.*

Appellant (p. 11) quotes from *Land v. Dollar,* 188 F.2d 629 (January 31, 1951). There the court was merely explaining that the judgment should be cast in the form of a decree for possession. The Dollars did not contend that the decree should be in any other form. They merely argued that, since the defendants were individuals, they had no standing to object, and that the separate appeal of the United States, *eo nomine,* had to be dismissed because it was in a dilemma: If it was not bound, as it

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*Appellant (p. 13) quotes a passage from this opinion. But in it, in noting why the argument that the judgment was not *res judicata* was not relevant to any issue before it, the court merely described what a rule of *non-res-judicata* would mean. It did not say that such a rule applied here.

claimed, it had no standing to appeal; if it had a standing to appeal, it was bound. In our memorandum supporting that motion we submitted that "It is unnecessary for the court to decide whether the United States is or is not bound by the judgment, for in either event the appeal must be dismissed."*

Appellant quotes another passage from the April 11, 1951 opinion (190 F.2d 366, 375) but fails to note what immediately follows:

> "The claim as presently presented is a patent prostitution of a principle of high public importance, which is that the Government may not be sued without its consent lest a mass of unimpeded litigation interfere with the performance of government functions."†

Even more extraordinary is appellant's claim that this Court—the Ninth Circuit—has held that the judgment in *Dollar v. Land* is not conclusive. If there is any court before whom that issue has not yet come and to which it has never been briefed or argued until now, this is the court. And we do not suppose that it essayed a decision of a question neither presented, briefed or argued.

Appellant quotes from this Court's opinion of June 22, 1951, *Dollar v. United States,* 190 F.2d 547, the sentence, "Nor do we understand that it is argued that the United States may not prosecute that action." What was then before the court was our motion to stay a preliminary injunction pending appeal from it. The court was not even ruling on that appeal but only on the motion for a stay.‡

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*Page 9, Transcript of Record, Supreme Court, No. 552. This transcript is before this Court, having been admitted to be true (see p. 9, supra).

†Note also that what the court says in the quoted passage completely supports the other ground on which our judgment was granted in the court below, that is, lack of a genuine issue of fact—"In the present instance the right involves nothing of undetermined substance." (see pp. 61-96, infra).

‡At page 5, fn. 4, appellant's brief says that on January 10, 1952 this Court dismissed that appeal. True, it did so, but on *our* own motion, because the appeal had become moot, the final judgment having dissolved the preliminary injunction.

In the quoted sentence the Court was referring to our position as to the right of the United States to prosecute the action. That position was clear: Since the United States was not a party *eo nomine* in the District of Columbia litigation, a mere showing of the judgment would not stop the United States *on the threshold,* it would be necessary to go further and in some appropriate way plead and show the additional facts on which the collateral estoppel rested, and at a proper time and place, if it ever became necessary, we would do so. (See discussion at p. 8, supra.) Exactly that had been stated to the Supreme Court (see footnote at p. 56, supra) and in the record before this Court at the time of its June 1951 opinion. Pertinent portions of that record are in the record here. For example (R. 65):

> ". . . our adversaries . . . rely on . . . the statement in the opinion of the Supreme Court that the judgment to be rendered would not be res judicata of the United States. But all that this means is that, since the United States could not be made a party and therefore was not a party eo nomine, it may be at liberty to file a suit in its own name, *just as any natural person might do in like circumstance* to assert whatever right it might wish to assert, *and in such a suit it could not be said, from the bare face of the judgment alone,* that it is barred by the judgment on the threshold of the new suit."

And we added that on the basis of the further fact that the Attorney General had defended the case, the defense of conclusiveness of the judgment *would be presented at a proper time by a proper motion,* as by motion for summary judgment, as would other grounds for dismissing the complaint (R. 65, 71, 76, 77).

In its opinion of June 1951 this Court then posed, as one of the questions which would *later* arise *but which it was not then deciding,* this: "If the United States may prosecute the action, may it prosecute it as effectively as if there had been no prior litigation between *Dollar* or *Land,* or their successors?"

Furthermore, in all the court opinions noted above the references are to *res judicata,* none to the doctrine of collateral estoppel. In 65 Harvard Law Review at 476 it is said:

> "Although each court handling the *Dollar* case said that the judgment would not be 'res judicata' against the United States, they seem to have meant that, not having been a party, it would not be prevented from bringing a later action, but do not seem to have intended to foreclose a later determination of what issues might be raised in such an action. The term 'res judicata' seems therefore to have been used as an equivalent to 'merger' or 'bar' as used in the *Restatement of Judgments.* The related rule of collateral estoppel affects one 'who is not a party but who controls an action,' and binds him 'by the adjudications of litigated matters as if he were a party if he has a proprietary or financial interest . . . in the determination of a question of fact or of a question of law with reference to the same subject matter or transaction.' The principle behind both this rule and merger or bar is that repeated trials of an issue with the same evidence can only burden the courts and the litigants."

Until now there has never been a case where, after suit had been brought under the principles applied in *Land v. Dollar,* 330 U.S. 731, the government has not acquiesced in the judgment of a federal court as conclusive of the issue of title of the United States. It seeks to do so now.

We submit that neither justice, equity, law nor morals countenance the effort.

II.

NO GENUINE ISSUE OF FACT EXISTS, THE UNDISPUTED AND ADMITTED FACTS ESTABLISH THAT THE 1938 TRANSFERS WERE A PLEDGE, AND THEREFORE A SUMMARY JUDGMENT WAS PROPERLY ENTERED FOR APPELLEES.

The Department of Justice seeks to retry the issue on the theory that the judgment in *Dollar v. Land* does not conclude it because it has changed the name of its client. But quite apart from con-

clusiveness of the judgment, the motion for summary judgment was still properly granted.

The defense presented in Part I of this brief rests on (1) the District of Columbia judgment, plus (2) the fact of control of the litigation by the Department of Justice in the interest of the United States. The defense now to be discussed goes behind the judgment to the record of that case and of this.

No court can be expected to engage in a trial of a *feigned and spurious issue.* The procedure of summary judgment was designed to dispose of litigation where there is no genuine issue of fact. *R.C.P.* Rule 56. As said in *Engl v. Aetna Life Ins. Co.,* 139 F.2d 469, 472, 473 (2 Cir.):

> "* * * The federal summary judgment proceeding is the most extensive of any jurisdiction * * *. the history of the development of this procedure shows that it is intended to permit 'a party to pierce the allegations of fact in the pleadings and to obtain relief by summary judgment where facts set forth in detail in affidavits, depositions, and admissions on file show that there are no genuine issues of fact to be tried.' "

See also this Court's decision in *Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd.,* 185 F.2d 196, 205 (9 Cir.).

As said in *United States v. Maryland Casualty Co.,* 147 F.2d 423, 425 (5 Cir.) (1945), "Summary judgments are looked upon with favor, and they will be upheld unless there is some genuine issue of fact presented."

This Court has frequently upheld them and has done so in cases involving long records. Cf. *Burnham Chemical Company v. Borax Consolidated, Ltd.,* 170 F.2d 569, *Suckow Borax Mines Consolidated, Inc. v. Borax Consolidated, Ltd.,* supra, and cases cited therein.

A. The Court of Appeals for the District of Columbia Has Demonstrated That There Is No Genuine Issue of Fact.

The contention that the transfer of 1938 was outright has no substance. In *Land v. Dollar,* 190 F.2d 366 (April, 1951) the Court of Appeals for the District of Columbia, although assuming for the argument that its judgment was technically not *res judicata* against the United States, said (p. 375):

> "The question whether the United States is the owner of this stock has been presented to the courts and has been decided. The only basis thus far presented for the claim that the United States owns the shares is that the transaction in 1938 was an outright acquisition and not a pledge. *That issue has been adjudicated to a final conclusion in a judicial proceeding in which the issue was properly before the court.* We say 'a final conclusion' because surely an issue which has been considered three times by an appellate court and three times by the Supreme Court ought to be finally concluded. In that proceeding officials claiming to act as agents of the United States in respect to these shares were parties. The Attorney General of the United States, through his deputies and assistants, was counsel. The United States appears to seek to assert *nothing of substance which has not been asserted and adjudicated.*"

Previously, when that court decided the case on the merits in July 1950, it said (*Dollar v. Land,* 184 F.2d 245, 253 (2d col.)):

> "It seems *plain beyond question* that if this transfer had occurred between two private individuals *no court of equity would have treated the transfer of the shares as other than a pledge.*"

Again it said (p. 256, 2d col.):

> "*Any other conclusion,* if the transaction were between private parties, *would be wholly untenable* in our opinion. We do not see why the transaction should have a different essential nature merely because a Government agency was a party."

Again, it described the contrary contention as "fallacious logically" (p. 257, 1st col.).

The Court of Appeals thereupon reversed *and set aside a finding by the District Court* that the transfer was one of outright ownership.

The full meaning of the Court of Appeals' ruling appears in sharp relief by recalling the limits of the power of an appellate court to set aside findings of a trial court and to substitute its own. That power is confined in the extreme. It may not be exercised merely because an appellate court disagrees with the findings. It may be exercised only if the findings are "*clearly* erroneous". *R.C.P.* Rule 52.

As this Court itself has said, before a finding may be set aside, it must be unsupported by "substantial evidence". *Pacific Portland Cement Co. v. Food Mach. & Chem. Corp.,* 178 F.2d 541, 548 (9 Cir.). As said again by this Court in *United States v. Foster,* 123 F.2d 32, 34 (9 Cir.), the record must be such "as would *compel* an overthrow of the findings made below." See also *Grace Bros. v. C. I. R.,* 178 F.2d 170 (9 Cir.). Or as said in *Anderson v. Federal Cartridge Corporation,* 156 F.2d 681, 684 (8 Cir.), the appellant must sustain the burden of showing that "the evidence *compelled* a finding in his favor."

As this Court has often said, an appellate court will not substitute its interpretation of a contract for that of a trial court, if the latter is tenable. *Portland Cement Co. v. Food Mach. & Chem. Corp.,* supra, at 553; *Quon v. Niagara Fire Ins. Co.,* 190 F.2d 257 (9 Cir.).

With these rules in mind, it is evident that the Court of Appeals ruled that the record **compelled** the conclusion of a pledge. *The United States Supreme Court denied certiorari* (340 U.S. 884), and it denied a petition for rehearing to review the same issue on March 12, 1951 (340 U.S. 948).

A "genuine issue", as the term is used in summary judgment procedure, is one which can be maintained by "substantial evidence". *Firemen's Mutual Insurance Co. v. Aponaug Mfg. Co.,* 149 F.2d 359 at 362 (5 Cir.). Yet, as the Court of Appeals has said, there is no substantial evidence to support a finding of outright transfer.

B. The Case Rests on the Identical Record as the District of Columbia Judgment.

The record on which the District of Columbia judgment rests is the identical one on which the present case was decided. That record was brought into the case in support of the motion for judgment by appropriate means. Not only was it proved to be the record, but the facts contained in it were established by admissions of their truth in response to requests for admissions of fact (see pp. 10-12, supra)* Appellant made no showing at all. Thus the record in *Dollar v. Land* became the record here.

Appellant concedes that the records in the two cases are the same. For example, it inquires (Br. 41): "How could a record which the District of Columbia Court of Appeals found presented a substantial issue of fact when it was before that court become a record not presenting a substantial issue of fact when before Judge Murphy?" But that Court of Appeals held that the record presented no substantial issue of fact. On no other basis could it have reversed. And so we rephrase the question: "How can a record involving no genuine issue of fact when it was before that Court of Appeals involve such an issue when before the court below?"

C. Where a Court of Appeals Has Ruled That a Given Record Requires a Given Conclusion, a Summary Judgment Accordingly Is Proper in Another Case on the Same Record.

Since a finding that the transfer was of outright ownership *had* to be reversed, in the opinion of one of the highest courts in the land, sustained by the Supreme Court, *a fortiori* no *genuine* issue of fact is presented on that record, and a summary judgment must be entered.

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*Appellant remarks (Br. 36, fn. 28) that this is not the complete record in *Dollar v. Land* but only those parts that counsel, including appellant's present counsel, saw fit to print for use of the District of Columbia Court of Appeals. Obviously, the Department of Justice omitted nothing relevant from that printing. And if appellant's counsel thought some portion omitted from the Joint Appendix was pertinent, he should have brought it before the court below by affidavit in opposition to the motion for judgment, just as appellee's counsel did with certain portions in support of the motion (see p. 9, supra).

This conclusion has nothing to do with whether or not the judgment in *Dollar v. Land* is *res judicata* here or binding under principles of collateral estoppel. In *Vail v. Arizona,* 207 U.S. 201, suit had been brought against county supervisors. The same issue had been decided in a previous case against a certain loan commission. The court held that the issue was settled, saying:

> "* * * In the two cases, 172 and 186 U.S. in which the validity of the refunding legislation was considered, Pima County was not nominally a party. The actions were brought by the holders of the bonds against the loan commission. Whether the county was technically bound by the decisions may be a question. It was heard by its attorney in the litigation, and was the party ultimately to be affected by the refunding. *Gunter v. Atlantic Coast Line,* 200 U.S. 273. But if it be not so bound, still under the doctrine of *stare decisis* the question should no longer be considered an open one" (p. 204).

The Court of Appeals for the District of Columbia applied the identical language to the government's present attempt to relitigate. It said in May 1951 (*Sawyer v. Dollar,* 190 F.2d 623, 647):

> "Respondents seem to exaggerate the effect of the doctrine of *non res judicata.* The doctrine does not mean that the judgment is invalid or incomplete. The judgment is *stare decisis* even though not *res judicata.*"

Upon the same record the same result should follow. *Prout v. Starr,* 188 U.S. 537.

If *Dollar v. Land* had been litigated through *this* Circuit, and *this* Court had written the opinions and rendered the decisions written and rendered in the District of Columbia, it would be sheer impudence to ask the District Court laboriously to receive, by formal trial, the same record, to blind itself to the analysis and scrutiny that had already been given to it, to retread it in aloof solitude, only to come out, as it must, at the same conclusion.

Leishman v. Radio Condenser Co., 167 F.2d 890 (9 Cir.), cer. den. 335 U.S. 891, a decision of this Court, is directly in point. Leishman had sued Associated alleging infringement by Crosley

radio tuners of a certain patent. On appeal this Court held that the patent's claims were not infringed. Later two other tuner manufacturers, Condenser and General, sued Leishman for a declaratory judgment that his patent was not infringed by their tuners. This Court affirmed a summary judgment for General and Condenser, saying (p. 892):

> "It is true that the pleadings, without the affidavits, showed that there was an issue as to a material fact, namely, an issue as to whether the claims were infringed by the Condenser tuners and the General tuners. However, one of the supporting affidavits * * * stated, in substance, that the Condenser tuners and the General tuners did not differ materially from the Crosley tuners. The statement was not controverted and hence was accepted by the * * * court, and is accepted by us, as correct. In view of our decision in the Associated case, holding that the claims were not infringed by the Crosley tuners, the * * * court correctly concluded that, in the case at bar, the issue as to whether the claims were infringed by the Condenser tuners and the General tuners was not a genuine issue."

That was a case where the judgment in the earlier suit could not conceivably have been binding in the later litigation by virtue of *res judicata* or collateral estoppel, since the manufacturers were different and had no part in the conduct of the first litigation. Nevertheless, the judgment in the previous case was held to be a proper basis for summary judgment.

That is a common-sense decision, and it sweeps aside the vast bulk of appellant's arguments. Realizing this to be so, appellant argues that this Court is not "bound" by what the Court of Appeals for the District of Columbia has ruled (Br. 41). Apart from collateral estoppel, that is true, since the two courts are of equal rank.

But the truism misses the essences of the matter. One of the essences is that on the identical record one of the highest courts in the land has held not only that the very transaction here involved was a pledge, but *that no court of equity could hold otherwise.*

If the transaction in *Dollar v. Land* were not the same as that here involved but merely a similar transaction,—if the record were not identical but merely similar—the decision would be considered as tremendously persuasive authority. But here the transaction and the records in the two cases are identical.

The federal courts are "many members yet but one body" being "arms of the same sovereignty", *Caterpillar Tractor Co. v. International Harvester Co.,* 120 F.2d 82, 86.

Whatever a court may do with respect to following decisions of other circuits in other circumstances, the rule of comity has prevailed when the earlier decision in another circuit deals, as here, with the application of well settled legal principles to particular facts. Certainly this is so where the facts in both cases are identical and undisputed, as here. If on the same record and the same issue different results should follow, the federal judicial system would fall into chaos.

In *Ball v. Chapman,* 1 F.2d 895, the Seventh Circuit followed a decision of the Second Circuit in a suit by the same plaintiff against certain persons who were associates of defendant in the later suit, arising out of the same transaction. It said (p. 896):

> "We are asked to first determine what weight should be given the decision of a court of coordinate jurisdiction, where the legal question is not only similar, but arises out of the same facts, the same transactions, and wherein the plaintiff in each suit is the same, and the parties defendant, in the suit that is ended, were some of the alleged tort-feasors who, with the defendant in the present suit, practiced the alleged fraud. While fully recognizing that such prior decision of the coordinate court is not conclusive upon us, it is manifestly entitled to great weight; and this is so, not only because of the respect we entertain for the opinions of these courts, but because such a policy tends to secure uniformity of ruling, and at the same time terminates litigation which otherwise might be well-nigh endless."

In *United States v. Freeman,* 37 F. Supp. 720, a *summary judgment was granted* against stockholders of a bank in a suit in the District of Massachusetts following decision of the same issue in another circuit against other stockholders. The court said (p. 724):

> "The Circuit Court of Appeals for the Seventh Circuit, in Reconstruction Finance Corporation v. McCormick * * * held [so and so]. The Supreme Court * * * denied certiorari.
>
> "In view of this situation, the Illinois litigation must be deemed to have settled the law applicable to the facts of this case. It would be presumptuous for this court to adopt views incompatible with the conclusion reached.
>
> "It follows therefore from the foregoing that the plaintiffs' motions cannot be defeated because of the existence of a genuine issue as to a material fact, nor because of the validity of any of the defenses raised in the pleadings."

In *General Motors Corporation v. Leishman,* 85 F. Supp. 187, Judge McCormick (S.D. Cal.) dealt with a patent which had been held to be invalid in the Tenth Circuit in a decision where the Supreme Court denied certiorari. Noting these facts the court said:

> "Thus the questioned claims involved in this action have been held by a federal appellate court of superior authority to ours to involve no invention, and while the decision of the appellate court in the Tenth Circuit * * * does not operate to control us in this action * * * we think, however, that *the appellate decision in the Tenth Circuit having been based upon substantially the same record as made herein,* we should and do consider such decision as highly persuasive * * *. This, we think, is manifestly the correct position for us to take in the light of the unanimous confirmatory decision of the Tenth Circuit Court of Appeals on rehearing as shown in the reported decision whereby it again rejected the contention that invention is found in the patent claims in controversy" (p. 188).

The quotation is remarkably apt, since the Court of Appeals for the District of Columbia has repeatedly confirmed its deci-

sion here, and the Supreme Court has repeatedly denied certiorari on the merits.

In *United States v. Weil,* 46 F. Supp. 323, 325, it is said that if a decision of another circuit is unanimous, "it would be the duty of this Court to follow it" unless it is "clearly erroneous." The same principle is stated in *The Bleakley No. 76,* 56 F.2d 1037.

Where the United States Supreme Court has three times denied certiorari, it would be idle to assert that the decision of the Court of Appeals for the District of Columbia is erroneous, much less clearly so.

See also *Topas v. National Shawmut Bank,* 53 F.2d 1020, and 21 *C.J.S.* 349.

D. The Claim That the District Court Denied Appellant the Right to Make a New Record Is Spurious. Appellant Simply Made None.

Perhaps the major burden of appellant's brief is its reiterated complaint that the District Court denied it the chance of making a different record, introducing different evidence, or making a case (cf. Br. 34, 42, 45, 53). *There is not a spark of truth to this complaint.* The District Court denied appellant no opportunity. It had the same opportunity as any litigant to show the existence of a genuine issue, when a motion for summary judgment is made. But, as the District Court states (R. 288):

> "In response to this showing the Government has done nothing. It has presented no opposing affidavits, no depositions, or counter admissions. Although in oral argument it hinted at some 'other evidence,' it failed to produce it in response to the motion. Obviously, the whole purpose of the summary judgment procedure would be defeated if a case could be forced to trial by merely contending that an issue exists, without any showing of evidence. * * *"

And again (R. 290):

> "The Government, by inaction, has joined the issue on the former record * * *."

As stated by this Court in *Gifford v. Travelers Protective Association,* 153 F.2d 209, 211 (9 Cir.), where a party moves for summary judgment and places before the court, as we did here, the material facts which would entitle him to judgment,

> "and which the plaintiff does not discredit as dishonest, it rests on the plaintiff, in opposing defendant's motion for summary judgment, at least to specify some opposing evidence which it can adduce and which will change the result."

The opposing party must show, by the procedures prescribed by *R.C.P.* Rule 56, how he will support his contention that a genuine issue is present. *Egyes v. Magyar Nemzeti Bank,* 165 F.2d 539 (2 Cir.). He cannot simply assert, darkly, that he has other evidence. He must submit that evidence to the court, and it must be of a nature as could create a genuine issue. *Engl v. Aetna Life Ins. Co.,* 139 F.2d 469 (2 Cir.); *Gray v. Amerada Petroleum Corporation,* 145 F.2d 730 (5 Cir.); *Chandler Laboratories v. Smith,* 88 F. Supp. 583. In the *Aetna* case the Second Circuit said:

> "* * * Hence we have often held that mere formal denials or general allegations which do not show the facts in detail and with precision are insufficient to prevent the award of summary judgment. * * *
>
> "In the present case we have from the plaintiff not even a denial of the basic facts, but only in effect an assertion that at trial she may produce further evidence, which she is now holding back * * *. If one may thus reserve one's evidence when faced with a motion for summary judgment there would be little opportunity 'to pierce the allegations of fact in the pleadings' or to determine that the issues formally raised were in fact sham or otherwise substantial. It is hard to see why a litigant could not then generally avail himself of this means of delaying presentation of his case until the trial. So easy a method of rendering useless the very valuable remedy of summary judgment is not suggested in any part of its history or in any one of the applicable decisions" (p. 473).

Appellant seeks to evade its failure to make a counter-showing by arguing (Br. 36) that the moving party has the burden of showing the absence of a genuine issue of fact. But, as stated in 3 *Barron & Holtzoff,* Federal Practice and Procedure, Sec. 1235, p. 88, when the moving party

> "has made a *prima facie* showing to this effect the opposing party cannot defeat the motion for summary judgment and require a trial by a bare contention that an issue of fact exists. He must show that evidence is available which would justify a trial of the issue."*

Appellant also seems to claim that the mere assertion in the complaint of title was enough to defeat a motion for summary judgment. This Court has more than once rejected this contention that the averments of a pleading can defeat the motion, for such a rule would destroy the summary judgment procedure entirely. *Lindsey v. Leavy,* 149 F.2d 899 (9 Cir.); *Piantadosi v. Loew's, Inc.,* 137 F.2d 534 (9 Cir.); *Suckow Borax Mines Consolidated v. Borax Consolidated, Ltd.,* 185 F.2d 196 (9 Cir.) at 205; *Leishman v. Radio Condenser Co.,* 167 F.2d 890 (9 Cir.); *Christianson v. Gaines,* 174 F.2d 534, 536 (D.C. Cir.).

Appellant then argues that here its complaint was verified (Br. 47). The fact is irrelevant. A verified complaint may serve as an affidavit in opposition to a motion for summary judgment, but only if it conforms to the requirements of Rule 56. The verification here was by one of appellant's attorneys, "Donald B. MacGuineas, attorney, Department of Justice." Mr. MacGuineas has no personal knowledge of the 1938 transfers, and does not show that he would be competent to testify, as Rule 56(e) requires. *Piantadosi v. Loew's, Inc.,* supra.

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*Appellant argues that in some cases summary judgments were held to be improper although no opposing showing was made (e.g., Br. 47). Obviously, if the showing made in support of a motion is inadequate, no opposing showing is necessary. But it is absurd to liken this case to such as that.

MERE ASSERTION CANNOT SUFFICE

Appellant asserts that it informed both District Judge Harris, on the motion for preliminary injunction, and District Judge Murphy, on the motion for summary judgment, that "The Government is prepared to offer on the trial of the case new evidence" (Br. 49). But, as just seen, mere claims will not do. Before Judge Harris counsel did not even specify what new evidence he had or how it could possibly be material.* Counsel had merely said,

> "I assert to Your Honor right now the Government has new evidence not presented in the District of Columbia action which it will present upon the trial of this case." (R. 70)

Over two months later, when the motion for summary judgment was being argued, and when it was counsel's duty to make his assertion good about the alleged new evidence which two months before he said he had "right now," he still had no showing to make and still made none.†

There never was any showing in any manner, either in that required by the Rules of Civil Procedure or in any other. The dark insinuations that appellant might have other evidence were never anything but a momentary excuse for the filing of the new suit.

In simple truth it is inconceivable that there could be any *material* evidence, relevant to the agreement and transfers of 1938, that was not introduced at the trial in *Dollar v. Land.* To suggest that there could be is to condemn the Department of Justice of shocking incompetence in handling that litigation. The record shows, without contradiction that the Department of Justice and counsel for the Dollars spent many months together upon a

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*At that time no motion for summary judgment was even pending. Appellees had not yet filed their answer.

†Four months after that, when the motion for judgment had already been granted, some reference was first made to alleged new evidence, but purely by way of assertion in a memorandum in support of a motion for injunction pending appeal. We shall consider this at pages 76, 92-96, below.

mutual disclosure and discovery of evidence, made available to one another vast quantities of documents, so that each might determine what could be relevant, and concluded after this extensive search for documents, exploration of files, and mutual disclosures, in a long stipulation of facts. A certified copy of that stipulation is before this Court as Exhibit 1 to the Request for Admissions of Fact.*

The obvious truth is shown by the fact that when, in May 1951, the Solicitor General asked the Supreme Court the second time for leave to petition for reconsideration of *Land v. Dollar,* he stated to that Court that if it would decide the issue of pledge or sale, the government would be satisfied to have the case decided on the record there, would not care to relitigate with new evidence, and would drop the instant cause. Mr. MacGuineas, appellant's counsel here, told this Court the same thing on May 31, 1951.† Could appellant in good faith deny to the court below the completeness of the record which it asked the Supreme Court to accept and which it stated was wholly sufficient for a decision?

What the Court of Appeals for the District of Columbia said, in *Sawyer v. Dollar,* 190 F.2d 623, 646, is true:

> "the new litigation [i.e., the present suit] pictured to us in these papers involves no new law, person or circumstance."

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*The foregoing facts appear in Part III of an affidavit of Moses Lasky (R. 276-277). They are uncontradicted, but appellant apparently assails Mr. Lasky (Br. 46, 47). It asserts that the trial court rested on Mr. Lasky's statement that no new evidence was available. That, of course, is not the case. Mr. Lasky's statement did not rest upon itself but was an obvious and sound deduction from the uncontradicted *facts* stated of his own knowledge.

That statement did not prevent appellant, if it could, from demonstrating the deduction to be unsound. But to do so it was necessary to make a showing of new relevant evidence. Yet, as the trial court stated, after noting the uncontradicted fact that "in compiling the stipulation he [Moses Lasky] and representatives of the Department of Justice exhaustively sifted every existing shred of evidence," the Government had done nothing in response to the showing (R. 288).

†Transcript of Proceedings of oral argument on motion to stay preliminary injunction, May 31, 1951, pp. 18, 19.

And again (p. 645):

> "* * * The United States does not allege that its claim now to be presented for adjudication in the new action involves any new or different point of fact or law. It merely claims that the judgment already entered by this court is in error."

And so the real reason for the effort to relitigate is disgruntlement with the decision of that Court of Appeals and hope for a different decision in another circuit (see p. 5, supra). But belief by defeated counsel that a court was wrong does not inject the quality of genuineness into a spurious issue.

APPELLANT HAS NO VALID EXCUSE FOR FAILING TO MAKE A SHOWING BELOW

Appellant complains that it would have been "unreasonable" to expect government counsel to submit an affidavit detailing new proof to be adduced at a trial (Br. 48). Forsooth, why? Government counsel are subject to the same rules as private litigants. If more time was needed, *R. C. P.* Rule 56(f) provided the procedure to follow. That rule prescribes:

> "Should it appear from the affidavits of a party opposing the motion that he cannot for reasons stated present by affidavit facts essential to justify his opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just."

Where one fails to utilize Rule 56(f), he may not on appeal from a summary judgment assert that it was unreasonable to expect him to make his countershowing. *Foster v. General Motors Corporation,* 191 F.2d 907 (7 Cir.); *Adkins v. E. I. du Pont de Nemours & Co.,* 181 F.2d 641 (10 Cir.). In the *Foster* case, where a summary judgment was affirmed, the court said (p. 912):

> "Plaintiffs made no attempt to comply with this requirement, which raises a presumption, so we think, that they were unwilling to put in affidavit form a statement to the effect * * *."

3 Barron & Holtzoff, Federal Practice and Procedure, p. 88, n. 16, states that one opposing a motion for summary judgment must show that evidence is available which would justify a trial, and adds:

> "Rule 56(f) * * * provides protection for the opposing party who makes such contention *in good faith* but is not able to procure evidence to support it at the time of the hearing."

But appellant made no applications under Rule 56(f).

Obviously, if appellant truly had new relevant evidence when it filed the suit, as it so suavely asserted at the time, it would not have over-taxed the capacities and resources of the Department of Justice to prepare an affidavit. It now states in 4 pages its alleged new evidence (Br. 49-52), and all of it relates to documents. It would have been simple to attach photostat copies to an affidavit. But this would have let the papers speak, and it would have shown the claim of relevant new evidence to be spurious and sham (see pp. 91-96, infra).

And even were it true that an affidavit or affidavits of some length would have been required, that would be no excuse for making none. As said in *Hemler v. Union Producing Co.,* 40 F. Supp. 824, 834:

> "I do not believe that the plaintiff can take the arbitrary position that because of the complicated nature of the case or the difficulty of showing the existence of facts in his favor, that he will simply * * * offer none of his own."

APPELLANT'S EFFORT IN ITS BRIEF TO GO OUTSIDE THE RECORD MADE BELOW IS IMPROPER

Appellant's brief now professes to list a number of items of new evidence (Br. 49-52). This is still *mere* assertion. And we shall show that the assertion is utterly empty (pp. 91-96, infra).

But apart from that, such assertions in an appellate brief have no standing. As said in *Foster v. General Motors Corporation,* 191 F.2d 907, 911 (7 Cir.):

> "Obviously, this contention must be resolved *on the record as made,* and when viewed in this light plaintiffs are in a poor position to contend that there was before the court such an

> issue. Some of such issues here urged were raised only in the brief which the plaintiffs filed in opposition to defendant's motion for summary judgment, others were raised for the first time in their briefs before this court."

The court held that nothing could be considered but the record presented to the District Court, consisting only of the complaint and answer, the motion for summary judgment, and defendant's showing in support thereof. The same is true here.

E. This Case Involved No "Battle of Affidavits" but Contains the Ideal Record for Summary Judgment.

Appellant's brief agitates the elementary principles governing summary judgments. Essentially its argument comes down to the dislike of courts for decisions based on a "battle of affidavits," where there has been no real opportunity to present the case in an adversary manner, and no real opportunity to subject the record to a close scrutiny by a court (e.g., Br. 35, 38, and cases there cited).

But there was no such battle of affidavits here. The vice in appellant's position is its blindness to these overriding facts:

1. Here the record, which was later made the record in this case, was produced in a case which has in fact been tried in an adversary manner.

2. The evidence was subjected to probing by opposing counsel, the very counsel conducting the present case.

3. The record thus produced was then plumbed, analyzed and subjected to critical scrutiny by a United States Court of Appeals, with the results of its analysis reduced to writing in an able opinion. And that record is the record now before this Court. Never before was a District Court so well favored in determining whether a genuine issue existed.

Kennedy v. Silas Mason Co., 334 U.S. 249, typical of authorities cited by appellant, is authority against it. There the court observed (p. 257) that the desideratum for exercising summary judgment jurisdiction was a record which presented a

> "solid basis of findings based on litigation or on a comprehensive statement of agreed facts."

But exactly that desideratum was present here in full measure. Not only has there been litigation resulting in a solid basis of findings, but, as we shall note, the record was, in overwhelming part, and in all relevant parts, an agreed statement of facts (pp. 11 supra; 80-87, infra).

In *Leishman v. Radio Condenser Co.,* 167 F.2d 890, discussed at p. 66, supra, this Court recognized that a decision by a Court of Appeals on an identical record is a controlling factor in exercising summary judgment powers.

Furthermore, an element that has largely influenced decisions respecting summary judgments is that the right to a jury trial should not be limited (so emphasized in *Sartor v. Arkansas Gas Corp.,* 321 U.S. 620, cited App. Br. 35). For example, while appellant quotes (Br. 44, 45) from *Stevens v. Howard D. Johnson Co.,* 181 F.2d 390, it deletes this passage: "It must not be forgotten that in actions at law, trial by jury of disputed questions of fact is guaranteed by the constitution."

But the present case is one in equity. A single judge passed on the record on the motion for summary judgment. And a single judge would have passed on it had it come in by formal trial. Appellant is fencing with form, not substance.

Where on motion for summary judgment the moving party brings before the court the facts that a formal trial would produce, and the conflict is as to the inferences to be drawn therefrom, the case is one for summary judgment. *Otis & Co. v. Pennsylvania Railroad Co.,* 61 F. Supp. 905, affirmed 155 F.2d 522; *McComb v. Southern Weighing and Inspection Co.,* 170 F.2d 526 (4 Cir.).*

Where the conflict in a case is as to the conclusion to be drawn from undisputed facts, a summary judgment should be ordered. *Fox v. Johnson & Wimsatt,* 127 F.2d 729, 736, 737 (D.C. Cir.) by Rutledge, J., later on the United States Supreme Court).

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*The rationale of the rule is the same as for the principle that where decision rests on ultimate inferences and conclusions from the evidentiary facts, an appellate court is not bound by those drawn by a trial court. *Sun Ins. Office, Ltd. v. Be-Mac Transport Co.,* 132 F.2d 535 (8 Cir.); *Kuhn v. Princess Lida of Thurn & Taxis,* 119 F.2d 704, 705-6 (3 Cir.

THE FACT THAT THE GOVERNMENT IS INTERESTED DOES NOT MAKE SUMMARY JUDGMENT LESS APPROPRIATE

Appellant finally argues that in a case involving "complex issues of public importance" a summary judgment is inappropriate (Br. 53). It is sufficient to reply that the issue whether the contract of 1938 was a sale or pledge is *not* of public importance. As said in *Land v. Dollar,* 190 F.2d 366 at 375:

> "The ownership of these shares of stock is not a high function of government; it would be at the most an operation by the Government in a commercial field. The Government officials before us are not here defending the right and duty of the Government to govern; they are asserting its right to own shares in a *purely private commercial enterprise.*"

Nor is the issue novel or complex. The question whether a transfer is a pledge or sale often arises between lender and borrower. It is an old head of equity jurisdiction. As the District of Columbia Court of Appeals has said, *Dollar v. Land,* 184 F. 2d 245, 256:

> "Any other conclusion, if the transaction were between private parties, would be wholly untenable in our opinion. We do not see why the transaction should have a different essential nature merely because a Government agency was a party."

And it is settled that summary judgment may be entered against the government. *United States v. Maryland Casualty Co.,* 147 F.2d 423 (5 Cir.); *United States v. William S. Gray Co.,* 59 F. Supp. 665.

F. Appellant's Charge That the District Judge Was Derelict in the Duties of His Office Is Unwarranted.

Appellant charges that the District Court made no independent examination of the record and did not formulate its own con-

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1941); *Carter Oil Co. v. McQuigg,* 112 F.2d 275, 279 (7 Cir.); *Western Union Telegraph Co. v. Bromberg,* 143 F.2d 288 (9 Cir.); *United States v. Anderson,* 108 F.2d 475, 478-479 (7 Cir. 1939); *Himmel Bros. Co. v. Serrick Corp.,* 122 F.2d 740 (7 Cir.); *Murray v. Noblesville Milling Co.,* 131 F.2d 470, 474 (7 Cir. 1942).

struction.* This inexcusable charge is apparently based on the fact that the court's opinion does not restate the facts. But why should it? That task had been fully performed in *Dollar v. Land,* 184 F.2d 245. The court below was warranted in saying, as it did (R. 284),

> "There has been a thorough review of the facts in numerous prior opinions (see Dollar v. Land, 154 F.2d 307; 330 U.S. 731 * * * 184 F.2d 245 * * * We see no reason to repeat them here."

G. The opinion of the District of Columbia Court of Appeals Concededly States All the Material Facts in the Record.

In our briefs in the District of Columbia Court of Appeals, the issue of pledge or sale was examined *in extenso.* Our opening and reply briefs contained nearly 200 pages on the subject. We would hesitate to burden the Court with a repetition of that discussion. And the opinion of that court makes it unnecessary to do so. Everything stated as a fact in that court's opinion, 184 F.2d 245, is concededly a fact; it has never been suggested that the opinion was guilty of a misstatement. Similarly, that opinion states all the material facts; it has never been suggested that it omitted mention of any fact whatever in the record thought by the Department of Justice to be material.

H. The Case Is Controlled by Admitted Facts.

The District of Columbia Court of Appeals, after reviewing the record in all its details, concluded that it had to hold the transfer to be a pledge because of *two overriding and compelling facts.* It said (184 F.2d 245, 253, 254):

> "* * * We are led to this conclusion principally by the weight of two considerations: (1) The general equitable character of the transaction and (2) the action of the Commission, at the time, in issuing the new certificates to itself and not to the United States."

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*The District Court had the case under submission from June 4, 1951 to October 3, 1951.

FIRST COMPELLING CONSIDERATION

The first compelling consideration rests on admitted facts which may be tersely summed up thus:

In the 1920's appellees Dollar of California and R. Stanley Dollar purchased certain ships from the old Shipping Board, the predecessor of the Maritime Commission, and as part of the purchase price gave promissory notes and ship mortgages to the United States (J.A. 294-310). In 1929 these ships were transferred to Dollar of Delaware (APL) with the necessary consent of the Shipping Board, under an agreement whereby all three became jointly and severally liable on the notes (J.A. 310-319). Other transactions resulted in other notes to the United States (J.A. 321). By August 1938 the amount still owed by Dollar of Delaware to the United States was roughly 7½ million dollars. Of this debt Dollar of California was jointly and severally liable for about one-half and R. Stanley Dollar for about one-fourth (J.A. 350, 351).

As stated by the Court of Appeals, "At this time the Adjustment Agreement, which is the nub of the present controversy, was made. The financial position of Dollar of Delaware was precarious." (184 F.2d at 250).

The agreement provided that a number of stockholders of Dollar of Delaware, including the joint obligors, Dollar of California and R. Stanley Dollar, but also including others who were in no way indebted to the United States, were to "transfer or cause to be transferred" all the stock involved in this case "to the Commission or its nominees."

The agreement also provided that no credit on the debt should be allowed by reason of the transfers (R. 26, and see 184 F.2d 250), and none ever was.

Adverting to these facts the Court of Appeals summed up their compelling effect thus:

> "* * * The details of the transaction are exceedingly complicated, but they are summarized simply. Dollar was a debtor in a sum of some $7,000,000. At a time when its

financial outlook was exceedingly bad its owners 'transferred' to its creditors 92 percent of its stock. Thereafter Dollar paid off its debt in full.

"Because of the power which a creditor has over his debtor, especially a distressed debtor, equity views with considerable skepticism claims by the creditor of rights beyond the right to security and repayment. Pomeroy states the matter thus:

* * * * * * *

"Equity tends strongly to treat as mortgages or pledges transactions between debtors and creditors relating to property of the debtors; even conveyances absolute on their face may be treated as mortgages if in fact they were security for and not satisfaction of the debts. Pomeroy, citing many cases, describes the 'general criterion * * * established by an overwhelming consensus of authorities,' 'the practical test,' 'the sure test and the essential requisite.' This criterion is the continued existence of the debt.

* * * * * * *

"In the case before us the debt remained in full force after these transactions and was paid in full. To hold that the creditor not only received payment in full but also became the owner of the debtor in full and absolute ownership would require a clear, almost inescapable, dictate to that effect. There is no such language or circumstance in this record. We give great weight to the application of this firmly established rule of equity."

A controlling principle of law was stated by the Court of Appeals thus (*Dollar v. Land,* 184 F.2d 245 at 256):

"In ordinary commercial transactions full consideration for release from a suretyship is paid by the surety in either of two ways, (1) satisfaction of part of the debt or (2) other collateral acceptable to the creditor is supplied. * * * Where the debt continues intact and the creditor releases a surety upon deposit of a paper security, the creditor does not by that transaction alone become absolute owner of the security thus deposited. He holds it as pledgee."

As part of the first compelling consideration other admitted facts stand out. The negotiations which culminated in the transfers began in 1937 and continued steadily. Admittedly, they started as demands by the Commission for additional security, particularly for voting control of the company. And in late April 1938 the Commission formally demanded that it be given that control by a *pledge* of the stock in question (cf. 184 F.2d at 252).

It is elementary that where negotiations between a debtor and creditor begin in demands for, or in discussions concerning, the giving of security (or better security than already possessed) and end in a transfer of property, the transaction is to be treated as having concluded just as the negotiations began, as a security transaction. Any claim that there was a change to an outright transfer, a sale of ownership, occurring somewhere along the line of negotiation, requires the clearest proof. The heavy weight of this burden is shown by *Morris v. Nixon,* 1 How. (U.S.) 118.*

The evidence overwhelmingly showed that no transmogrification of the character of the transaction under negotiation from one of pledge to one of sale occurred. It is not necessary now to burden the court with recital of the various items of evidence,† because one controlling fact stands out clear and admitted. As the Court of Appeals stated (184 F.2d at 254):

> "It is agreed by both parties that in the early stages the discussions concerned security only. There is no doubt upon that point. The question is whether there was an *abrupt*

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*See also 1 *Jones on Mortgages* (8th ed. 1928), Sec. 317, pp. 394, 395; *Smith v. Doyle,* 46 Ill. 451; *Smith v. Becker,* 192 Mo. App. 597, 184 S.W. 943; *Chance v. Jennings,* 159 Mo. 544, 61 S.W. 177, 181; *Dickens v. Heston,* 53 Idaho 91, 21 P.2d 905, 909; *Murray v. Butte-Monitor Tunnel Mining Co.,* 41 Mont. 449, 110 Pac. 497.

In *Marshall v. Thompson,* 39 Minn. 137, 39 N.W. 309, on the basis of this principle, a purported transfer was held to be a mere substitution of security held for the same debt.

†For example, although the Government's contention was that change occurred abruptly in June, in July the Commission's executive director reported to it that "the present phase of the Dollar negotiations began in March 1938 when the Commission sent Messrs. Houlihan and Wilcox to San Francisco * * *" (J.A. 1673).

> *change of subject.* The Commission relies heavily upon communications between it and its representative, *but so vital a change in the course of such negotiations* would have to be brought home to the corporation also. The expressions by which that is sought to be done are ambiguous to say the least."

A sale or outright transfer of title to the stock was never mentioned, either before the alleged change of character or afterwards. Neither the words "absolute title" nor "sale" appears in any scrap of paper sent to the Dollars, and the Commission did not orally communicate to the transferors the view that it would obtain ownership of the stock under the proposed agreement.

Not once during the course of negotiations did the Commission's San Francisco representative through whom negotiations proceeded mention to the Dollars the terms "sale" or "purchase" or state in any way that the Commission wanted or expected to receive outright title to the stock. Testifying for the Department of Justice, he stated that all that was said in conversations was the language of the contract itself (J.A. 1800, 1801).

Nowhere in the contract (R. 17-35) is there any provision or statement that absolute title was being transferred or that the transfer was one of ownership or sale. Nowhere does the contract contain the customary words found in bills of sale that the parties were selling and purchasing or that one party was granting, bargaining or selling. The Government relied purely and simply on the provision that the transferors agreed to "transfer * * * said stock * * * free and clear of all liens and encumbrances." But, as the Court of Appeals noted, these words in no way mean a sale (184 F.2d at 254, 2d col.).*

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*The use of the word "transfer" is not only consistent with a pledge but, as a matter of elementary law, in order to constitute a pledge a "transfer" of title is essential. *Brewster v. Hartley,* 37 Cal. 15, 99 Am. Dec. 237; *Nisbit v. Macon Bank & Trust Co.,* 12 Fed. 686 (S.D. Ga.); *First National Bank v. Bacon,* 113 App. Div. 612, 98 N.Y.S. 717, affirmed in *Zartman, Trustee in Bankruptcy v. First National Bank,* 216 U.S. 134;

The situation, as the Court of Appeals noted, is this: By reason of the existence of a debt, a creditor came into possession of certain property—92% of the debtor itself. Subsequently, the debt was paid in full; yet the creditor asserts the right to retain the property, thus claiming the right not only to be paid but to own the debtor as well.

The assertion is unique. The books are full of cases where a creditor, having obtained property by virtue of a debt, has insisted on retaining it as owner *in lieu* of accepting payment but has been compelled by law to accept payment and to restore the property. But the most diligent search—either in the law books or the annals of Wall Street—will fail to reveal a single case like the present, where the creditor not only claims his bond but his pound of flesh as well:—insists upon being repaid his debt and, being repaid, yet claims the property.

Were appellant to recover, the harsh injustices would be worked that the creditor has been paid its debt in full and yet remains the owner of 92% of the capital stock of the debtor which it received only because of the debt, all to the utter deprivation of the former owners.

SECOND COMPELLING CONSIDERATION

The second compelling fact was summed up thus (184 F.2d at 254):

> "We also think it of prime significance that the Plan provided for a transfer to the Commission, not to the United States; that the Commission caused the new certificates to be issued to the 'United States Maritime Commission,' not to the United States; and that the Commission continued to hold the certificates in its own possession without transfer to any recognized repository of property of the United States. If the transfer had been outright and absolute the stock belonged to the United States. * * * On the other hand the Commission was authorized by statute to manage and control the security for debts due the United States in shipping matters. The Commission, acting, at the time and since,

Hall v. Cayot, 141 Cal. 13, 17, 74 Pac. 299; *Brown v. New York Life Ins. Co.,* 22 F. Supp. 82, 89; *Fletcher's Cyc. Corp.* (perm. ed.) Sec. 5640, p. 843; *Borland v. Nevada Bank,* 99 Cal. 89, 33 Pac. 737.

> in accord with its own unimpeded judgment, treated the stock as in its own name, control and possession, a treatment consistent with the idea of pledge but wholly inconsistent with the idea that the United States was the outright and absolute owner. The Commission was an authorized custodian of collateral security, but it was not an authorized titleholder for property permanently owned outright by the United States."

If ownership were to pass, the stock would have had to be transferred to the "United States", for the Commission was not an entity and could own nothing. But on a transfer as security it was permissible that the stock be taken in the name of the Commission under Section 207 of the Merchant Marine Act of 1936 (46 U.S.C., Sec. 1117) which expressly empowered the Commission to enter into such contracts as might be necessary "to protect, preserve or improve the collateral *held* by the Commission to secure indebtedness."

Note also the provision that transfer might be made to a "nominee" of the Commission. In holding the stock as collateral and in exercising voting control thereunder as a means of "protecting, preserving or improving the collateral", the Commission could so administer its duties. On a transfer of ownership to the United States this was not permissible (cf. 33 Opinions of the Attorney General 570).

Two statutes, one *general* and one *special,* may be noted.

Title 40 *U.S.C.* Sec. 301 provides:

> "The General Counsel for the Department of the Treasury shall have charge of * * * property which have been or may be assigned, set off, or conveyed to the United States in payment of debts".

Sections 202 and 206 of the Merchant Marine Act of 1936 (46 U.S.C., Sec. 1112 and 1116) require all "proceeds" of all debts, notes and mortgages received by the Commission as successor to the Shipping Board to be placed in the Treasury.

The provisions for transfer to the Commission or its nominee, rather than to the United States, lay at the heart of the provision

for transfer, and were a sure sign and a positive representation to the transferors that the transaction was what it had started out to be, a pledge.

We have quoted passages from the opinion in *Land v. Dollar* at some length because the two facts that *compelled* the court to its conclusion *can never be whisked out of existence.* They are *conceded, undisputed and conclusive.*

THE CONTROLLING EVIDENCE IS STIPULATED OR DOCUMENTARY

The bulk of the evidence in *Dollar v. Land* and here is stipulated and documentary. And as the Court of Appeals there said (184 F.2d 245 at 249), the *material and controlling facts* consist *"entirely [of] documentary evidence or undisputed basic facts."*

THE INTERPRETATION OF THE 1938 CONTRACT WAS A PROPER MATTER FOR SUMMARY JUDGMENT ON THE RECORD

Speaking of this very case, 65 Harvard Law Review 467 states:

> "A trial on the merits resulted in a judgment for the Commission. On appeal, however, it was held *as a matter of law* that the transfer had been a pledge, and the case was remanded with instructions to give the stock to Dollar. The Supreme Court denied certiorari."

We have just seen (p. 78, supra) that a case is one for summary judgment where the conflict is as to the conclusion to be drawn from undisputed facts.

Furthermore, the issue is the construction of a contract, namely, whether the contract of 1938 called for a pledge or outright transfer of ownership. When the construction of a contract is to be reached from documentary or undisputed facts, as here, the issue is one of law, not of fact. *Bell & Grant v. Bruen,* 1 How. (U.S.) 169, 183; *Copp v. Van Hise,* 119 F.2d 691, 695 (9 Cir.); Cf. *Kuhn v. Princess Lida of Thurn & Taxis,* 119 F.2d 704, 705, 706 (3 Cir.); *University City, Mo. v. Home Fire & Marine Ins. Co.,* 114 F.2d 288 (8 Cir.); *P. J. Carlin Const. Co. v. Guerini Stone Co.,* 241 Fed. 545, 552 (1 Cir.).*

*To be even more exact, the construction of a contract is always one of law. When construction depends on extrinsic evidence, and where different

NO ISSUE OF CREDIBILITY OF WITNESSES IS INVOLVED

Appellant comments that credibility of witnesses is involved (Br. 44, 48). But on no relevant matter upon which any witness testified was there ever a dispute or an issue of credibility. The resolution of no question of credibility has ever been necessary or discussed in any opinion by any court. The statement that credibility is involved is pure assertion.*

The part played by "credibility" is the same in testing an appellate court's power to reverse a finding as in testing the pro-

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inferences of *fact* may be drawn from that evidence, the fact found by the trier may be binding. And the fact, so found, may be of such a character, in a particular case, as to permit but one permissible construction. But the construction is still always a question of law; in a jury case it remains a question for the court. *Estate of Thompson,* 165 Cal. 290, 296, 131 Pac. 1045; *California Well Drilling Co. v. California Midway Oil Co.,* 178 Cal. 337, 343, 177 Pac. 849; *O'Connor v. West Sacramento Co.,* 189 Cal. 7, 18, 207 Pac. 527; Cf. *Bartolotta v. Calvo,* 152 A. 306, 112 Conn. 385.

And, of course, where the *material* evidence is uncontradicted, the construction is one of law without doubt. See cases, supra, and also *Southern Pacific Co. v. Hyman-Michaels,* 63 C.A.2d 757 at 766, 147 Pac.2d 692; *Moffatt v. Tight,* 44 C.A.2d 643, 112 Pac.2d 910; *Atwood v. City of Boston,* 37 N.E.2d 131, 310 Mass. 70. The *Atwood* case is illuminating because it was a careful statement by one of the nation's outstanding courts, and because it cites Williston on Contracts as supporting the principles it expresses. The court there said:

> " 'But from whatever source light may be thrown upon the contract, * * * its meaning, what promises it makes, what duties or obligation it imposes, is a question of law for the court.' Smith v. Faulkner, 12 Gray. 251, 255. * * * Where there is conflicting evidence respecting the circumstances of the parties and the condition of the subject with which they are dealing, then a proper case arises for the jury. [Citation omitted] But where as appears in the present case the extrinsic evidence is not disputed or conflicting as to the material facts required to be found, the interpretation of the contract in its light still remains a question for the judge. Smith v. Faulkner, 12 Gray. 251, 255. Williston, Contracts, Rev. Ed. § 616. 65 A.L.R. 648, 652."

*Appellant relegates to a footnote (p. 44) its discussion of the subject, and there points to but two alleged instances, one involving the testimony of Mr. Dollar and one of Mr. Laughlin. But the facts are otherwise.

In our reply brief in the Court of Appeals for the District of Columbia we said (p. 34), "On this appeal we take the testimony of Mr. Laughlin (defendants' witness) wherever he positively testified to anything as a

priety of a summary judgment. The element of credibility is put in its place by the following terse quotations.

In *Dollar v. Land,* 184 F.2d 245, 249, the court quoted from *Orvis v. Higgins,* 180 F.2d 537, 539 (cer. den. 340 U.S. 810) thus:

> " 'Where the evidence is partly oral and the balance is written or deals with undisputed facts, then we may ignore the trial judge's finding and substitute our own * * * if the trial judge's finding must rest exclusively on the written evidence or the undisputed facts, so that his evaluation of credibility has no significance.' "

Perry v. Perry, 190 F.2d 601, 602, quotes this passage and cites *Dollar v. Land,* supra, as an example. In *Wabash Corp. v. Ross Electric Corp.,* 187 F.2d 577, at 599 (2 Cir.), the court sums up the authorities as making it proper for an appellate court to reverse a finding

> "when the issue can be resolved solely by a consideration of undisputed documentary evidence and physical exhibits (or of such documentary evidence and exhibits which render the oral testimony insignificant * * *)."

The court added:

> "The same may be the result when the oral testimony is virtually undisputed and abundantly corroborated by undisputed documentary evidence."

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fact." And in our Opening Brief (p. 114) we submitted the case with the statement that the testimony of the witnesses called by the Department of Justice "was largely irrelevant and was excluded, and what was admitted *may be accepted.*"

As for Mr. Dollar, no *fact* testified to by him has ever been questioned, nor does his testimony enter into the decision of the Court of Appeals for the District of Columbia. Mr. Dollar testified that no mention was made of "sale" or "outright transfer" in the oral discussions with Laughlin (J.A. 1169); Mr. Laughlin admitted that to be so, testified that nothing more was said than appears in the written agreement, and said that the word "pledge" was not used either (J.A. 1800, 1801), but Mr. Dollar did not say that it was. There was no conflict between them.

DIFFERENT INFERENCES ARE NOT POSSIBLE

Appellant next argues that the record permits different inferences of fact. *The Court of Appeals held that it does not.* Appellant asserts that the court in its opinion in 184 F.2d 245, enumerated certain categories of fact indicating that there was a sale of the stock and certain categories indicating a pledge, and then weighed them (Br. 38, 39). What the court did was to catalog and review every *argument* advanced by appellant here, *but it found none persuasive.* It then cataloged and reviewed every argument made on behalf of the Dollars. While it felt that some were inconclusive, *it found the force of others inescapable.* Its conclusion, drawn from the record as a whole, was that there was no choice of reasonable inferences, and that *any view other than that of a pledge was "wholly untenable."*

After painstaking "review of the whole record" a court is empowered to conclude that one set of inferences is "so overborne by evidence calling for contrary inferences that the finding * * * could not on the consideration of the whole record, be deemed to be supported by 'substantial evidence.' " *Labor Board v. Pittsburgh S.S. Co.,* 340 U.S. 498, 502. And so it was here. The question is not what conclusion should be drawn were there only one item of evidence, but the conclusion called for by the whole body of evidence.

With extreme selectivity appellant delves into the record and seeks to spin inferences to support its position. But all these matters were briefed, argued, subjected to careful and exhaustive analysis by a Court of Appeals. Appellant (Br. 39) asserts that "Obviously no court could rationally conclude that a record" containing certain listed items "did not raise a substantial issue of fact as to whether the stock was transferred outright." *But that is precisely what a Court of Appeals did hold,* for otherwise it could not have reversed the finding of an outright transfer. Thus appellant charges the District of Columbia Court of Appeals with being irrational, and with violating *R.C.P.* Rule 52(a). Indeed appellant openly asserts that that court disregarded the rule. Of course, it did no such thing.

These self-same assertions were made by the Department of Justice as the basis for its unsuccessful petition for certiorari. In *Land v. Dollar,* 341 U.S. 737, 748, Mr. Justice Jackson says:

> "This Court *examined* the decision of the Court of Appeals that the Dollar interests were entitled to the stock in question and decided that *it did not merit further review.*"

I. The Alleged New Evidence Asserted in Appellant's Brief (but Not Appearing in the Record) Is Utterly Empty.

We have seen that appellant made *no showing* in the District Court in opposition to the motion for summary judgment. We have also seen that an appellant may not advance alleged new evidence by mere assertion on appeal. Even if we ignore this fact and this rule, and gravely consider the items of alleged new evidence stated in appellant's brief (pp. 49-52), it will be seen that the claim of relevant new evidence is utterly empty. In the first place, the alleged evidence is not new. In the second place, it could not change the result (see pages 80 to 87, supra).

In *McComb, Administrator of Wage and Hour Division, U. S. Department of Labor v. Southern Weighing & Inspection Bureau,* 170 F.2d 526, 530 (4 Cir.), the court said:

> "* * * The matters which the administrator suggests that he might be able to develop on further hearing * * * could in no way affect the conclusion to be drawn from the admitted facts. Everything that the administrator says that he hopes to show on further hearing may be admitted, and the result remains the same. Under such circumstances there is no reason why summary judgment should not be entered and the litigation ended."

In *Leishman v. Radio Condenser Co.,* 167 F.2d 890, 892, discussed at p. 66, supra, where this Court affirmed a summary judgment because the same issue had been decided in another case on a similar record, it rejected the claim that additional evidence was available, saying, "This evidence, if it had been presented, would not have changed our decision in the Associated case."

With these considerations in mind, we examine the alleged "new" evidence.

1. MATTERS ALREADY IN THE RECORD OR OFFERED IN DOLLAR V. LAND.

(a) In item (f) appellant asserts that no entry was made on the books of American President Lines that the stock was in pledge, and it bases a legal argument on that fact and certain sections of the Delaware corporation law. But the fact of how the transfers appeared on the company's books was stipulated in *Dollar v. Land,* as were copies of the stock ledger and journal sheets themselves (J.A. 1458-1462). In offering them in evidence, government counsel referred to these very sections of the Delaware law (J.A. 1456) and said, "I * * * ask your Honor to note that the stock issued in the name of the Maritime Commission without any statement 'as a pledgee' contained thereon" (J.A. 1459, 1460).

Appellant also asserts as new evidence that the Maritime Commission voted the stock. That fact was stipulated and placed in evidence in *Dollar v. Land* (J.A. 372-375).*

(b) In item (b) (p. 49) appellant refers to alleged statements made by appellee Lorber's bookkeeper to the Bureau of Internal Revenue. But at the trial in *Dollar v. Land* government counsel put on the witness stand someone from the Bureau with the Bureau's file on Lorber and sought to offer statements of the bookkeeper (J.A. 1765-1774). The testimony was stricken and was also characterized as merely cumulative (J.A. 1773).

(c) In item (i) appellant asserts that R. Stanley Dollar knew before 1945 that the debt was paid. As newly discovered evidence for that assertion (itself irrelevant) it refers to APL's 1943 annual report. But it is a stipulated fact that appellees did

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*Too, the fact is irrelevant to the government's claim of ownership. The Maritime Commission had demanded a pledge of the stock with the right to vote in order to give it the managing control of the company as security (J.A. 110, 172, 1220). The pledge conferred on the pledgee the right to vote. See *Dollar v. Land,* 184 F.2d at 253. The controversy is whether the transfer was a sale or a transfer of "voting control of the company to protect the security of the Commission for the debts due" (184 F.2d at 252, 2d col., and see *Dollar v. Land,* 154 F.2d 307, 310).

not know until 1945 that the debt was paid (J.A. 390, 391). Moreover, the 1943 report was one of the documents authenticated by the stipulation (see Exhibit 1 to the Request for Admissions, at p. 22), and it was produced at the trial in *Dollar v. Land* to show that payment was not only not revealed but was concealed (J.A. 1312, 1414).

2. MATTERS PATENTLY IRRELEVANT.

(a) In appellant's item (e) (Br. 50) it is said that appellee The Robert Dollar Co. in a tax return for 1938 claimed a loss with respect to its stock because it was necessary to dispose of its investment.

But the stipulated fact is that The Robert Dollar Co. *never transferred any shares at all to the Maritime Commission.* It refused to have anything to do with the Commission (J.A. 252). Instead, it sold its shares to appellee Dollar Steamship Line in July 1938 for $1,415,972.00. The transfer from The Robert Dollar Co. to Dollar Steamship Line was made on APL's corporate books on October 24, 1938, and subsequently Dollar Steamship Line transferred the stock to the Maritime Commission (J.A. 291, 2039, 2040). The shares now claimed by The Robert Dollar Co. are not the shares owned by it in 1938 but came to it by later devolution of title (J.A. 292).

(b) In item (h) appellant refers to testimony allegedly given by one Dunham in probate proceedings of the J. Harold Dollar Estate. Dunham is no party to this suit, nor was he a party in *Dollar v. Land.* What he says could bind no one. He testified in *Dollar v. Land* as an accountant relative to statements made by him in connection with the affairs of Dollar Steamship Line. The alleged new evidence, pertaining to the J. Harold Dollar Estate, is not even impeachment.

(c) In item (j) appellant refers to newspaper clippings of 1943 to the effect that the Maritime Commission was offering to sell the stock, and it asserts that the Dollars made no protest. But the pledge of the stock carried a power to sell. Until the debt was paid in October 1943 (J.A. 389), there could be nothing to

protest. Cf. *Dollar v. Land,* 154 F.2d 307 at 309, 2d col. And appellees did not know until 1945 of the payment.

(d) In item (l) reference is made to reports of the Maritime Commission to Congress. Self-serving statements by the Commission that it owned the stock could not possibly be admissible.

(e) In items (c) and (d) reference is made to one Mortimer Fleishhacker. It is said in item (c) that the Maritime Commission wrote a letter to the Bureau of Internal Revenue claiming absolute title to Mortimer Fleishhacker's stock. But, as just noted, what the Commission wrote is self-serving and irrelevant. In item (d) reference is made to alleged statements of an alleged "representative," unnamed, of Mr. Fleishhacker. In *Dollar v. Land* the Department of Justice offered statements of a "representative" of Mr. Lorber, and they were excluded as not binding (see paragraph 1(b) above). Furthermore, Mr. Fleishhacker is not a party to the litigation. In October 1945, he transferred to R. Stanley Dollar his interest in 13,061 shares of the A stock, about 1/20th of the shares involved in the case.* As the Court of Appeals for the District of Columbia said of like statements, no knowledge is attributed to appellees (184 F.2d at 255).

(f) In item (k) appellant refers to newspaper stories appearing in 1938. A number of newspaper clippings of the same time were covered in the Stipulation of Facts in *Dollar v. Land,* were offered in evidence, and were rejected as immaterial (J.A. 1840-1844). A multiplication of newspaper clippings does not constitute new evidence. Appellant states that it would like to examine appellees about these newspaper clippings. But government counsel did exactly that in *Dollar v. Land* (J.A. 1186-1192). The argument based on these new items is nothing new. Counsel made it in *Dollar v. Land.*†

(g) In its item (a) appellant refers to a "second account of the executors of the J. Harold Dollar Estate" (Br. 49). In pre-

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*The case involves 2,100,000 shares of the B stock and 100,145 shares of the A stock (R. 5).

†In any event, a man's ownership in property cannot be destroyed by newspaper items or failure to read them, or if he reads them, to analyze them, or if he analyzes them, to protest them.

paring for trial in *Dollar v. Land,* government counsel examined the whole probate file, obtained certified copies, offered some of the documents in evidence, and some were received (D. Ex. 20, 21, J.A. 1462-1481). Others were even then excluded by the trial court as purely cumulative (J.A. 1482-1485). The document now referred to is just another of these papers. The alleged admissions of the executors of the J. Harold Dollar Estate were fully discussed before the Court of Appeals for the District of Columbia, and that court devotes a paragraph of its opinion to the subject, pointing out its insignificance, *Dollar v. Land,* 184 F.2d 245, 255, para. 9.

(h) In item (g) appellant refers to alleged testimony of one Ferguson, an executor of the J. Harold Dollar Estate, in its probate proceedings. This is repetitive of similar matters mentioned above, relied on by the government in *Dollar v. Land.* The answer now is the answer made then. Since an executor in California has no property interest in the estate, his statements, acts or omissions are not admissible against those who have, the heirs. *In re Bauer,* 79 Cal. 304, 21 Pac. 759. Appellant states, disingenuously, that Ferguson was attorney for the Dollars "at the closing of the stock transfer agreement." But as stipulated, Ferguson represented no one but the Estate of J. Harold Dollar in the negotiations and execution of the agreement of August 15th (J. A. 2045). He was *later* engaged for the limited purpose of superintending the exchange of papers in the transaction already agreed upon. An expression of opinion by him in the probate of the J. Harold Dollar Estate is not binding on the heirs as to the nature of the stock transfer. An attorney cannot waive anyone's rights by his construction of the legal effect of an instrument. *Hasman v. Canman,* 136 Cal. App. 91, 28 Pac.2d 372; *Adelstein v. Greenberg,* 77 Cal. App. 548, 552, 247 Pac. 520. Nor can he bind anyone by an expression of opinion concerning legal rights. *Restatement of Agency,* Sec. 288; *Duff v. Duff,* 71 Cal. 513, 12 Pac. 570.

Obviously, his testimony in the J. Harold Dollar Estate is not binding on anyone else. What an attorney says while acting for one principal is not an admission against another. *Welch v. John-*

son, 93 Ore. 591, 184 Pac. 280; *Yonkers Builders Supply Co. v. Petro Luciano & Son, Inc.,* 269 N.Y. 171, 199 N.E. 45 at 47.

III.

THE UNITED STATES MARITIME COMMISSION NEVER HAD LEGAL AUTHORITY TO ACQUIRE OUTRIGHT OWNERSHIP OF THE STOCK FOR APPELLANT.

As we have already noted (pp. 2, 7, 17), regardless of any other point discussed in the previous pages, if the Maritime Commission had no statutory authority to purchase outright title of the shares, the judgment must be affirmed. And this is a pure question of law.*

A. The Decisions of the Court of Appeals for the District of Columbia in Land v. Dollar Establish That the Commission Lacked the Power.

This precise matter was thoroughly argued in the briefs and orally before the Court of Appeals for the District of Columbia. And the several decisions of that court are authority that the Commission lacked the power.†

In *Land v. Dollar,* 188 F.2d 629 (Jan. 31, 1951), cer. den. 340 U.S. 948, that court described its decision of July 1950 thus (p. 631, 1st col.):

> "it was here held that (1) *the Commission had no power to acquire outright ownership of the stock,* and (2) the plaintiffs were pledgors."‡

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*The question, of course, is not whether the United States had the power, but whether the Commission had it. The power rests in Congress until granted by it to some agency. An agency, by acting beyond its statutory grant, would "impinge upon the congressional prerogative." *Peoples Bank v. Eccles,* 161 F.2d 636.

†It may be noted, too, that one of the judges, Judge Clark, was a member of the Senate Committee on Interstate and Foreign Commerce at the time the Merchant Marine Act of 1936, which created the Maritime Commission, was considered and passed. He had a personal knowledge of the legislative history.

‡The appeals, on which the January 1951 decision was rendered, had to do with the form of the judgment and its enforcement. Technically, the court was thus not deciding other questions but was describing what

In *Sawyer v. Dollar,* 190 F.2d 623, the court further discussed the power of the Commission to take ownership of the stock (at pp. 643-645). Among other things it said (p. 644):

> "So, in the present case, the debts due the United States by the steamship company made advisable the operation of the Lines by the Commission, just as debtor difficulties often require operation by a receiver on behalf of the creditor. *But the nationalization of an industry or a company is a totally different matter. It is to be undertaken only upon the most explicit authorization and direction of the Congress. There is no such authorization or direction in this instance."*

The opinion of July 1950, *Dollar v. Land,* 184 F.2d 245, cer. den. 340 U.S. 884, considered in more detail the arguments advanced in support of the Commission's alleged power to take ownership. The government's major argument at that time was that the power was implied and derivable from the power of the Commission to grant subsidies and from an alleged power to rehabilitate and maintain services essential to the Merchant Marine. Indeed, *this was the sole contention originally made.*

Referring to this argument, the court said, 184 F.2d 245 at 256, 1st col. (and the Supreme Court denied certiorari):

> "But, however extensive the statement of the argument is, the unglossed contention is that the grant of a subsidy could be (and was in this case) part of the consideration for the outright acquisition of all the common stock of a company. *A more direct contradiction of the terms and intent of the statutes,* both those relating to this Commission and those relating to the Reconstruction Finance Corporation, *could scarcely be formulated. The subsidy and loan powers there provided were for the rehabilitation of private industry. They were not blinds for Government acquisition of operating industrial concerns. Subsidy is not a synonym for socialization.* While it is perfectly true that the Commission could, and should, make all proper and desirable requirements for the protection of Government loans, *its power*

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it had decided in July 1950. The quoted statement shows, however, the views of the court on the subject of statutory authority, reached after the most thorough and comprehensive study of the question.

stops at the line which separates the lender from the acquisitor. It could validly come into ownership of stock in the course of foreclosing collateral in the collection of a debt,* but *it could not acquire outright ownership in the guise of lending money and creating a debt.* If the Commission did in fact grant the subsidy and arrange the Reconstruction Finance Corporation loan as consideration for the acquisition of outright and absolute title to full ownership of this stock, we think *it exceeded any power granted it by the Congress.*"

The court further said (184 F.2d 245, 249, first col.):

"The first problem presented to us upon this appeal is whether the Commission had authority to acquire the shares of stock outright by purchase. If it had such authority it had authority to acquire by purchase the stock of any operating ship company and to operate that company. *The Commission was created by statute and has only such authority as the statute, directly or by necessary implication, confers upon it. It does not contend that the statute specifically or in terms confers the power to acquire and operate a steamship company, and careful reading does not reveal any such provision.*"

And again it said (184 F.2d 245, 249, second col.):

"The power to own and operate transoceanic steamship lines is a power of tremendous scope. It would involve decisions of vast national importance and the collection and disbursement of vast amounts of public funds. *It is inconceivable to us that Congress would have left to implication so vast a power. We do not think that if Congress had intended the Maritime Commission to enter upon such ownership and operations it would have left the matter entirely to a clause which merely authorized the Commission to execut contracts.*"

The court then noted an argument that the Commission had the power to acquire the stock as an incident to an alleged power to compromise claims. *That argument was an afterthought first*

*There was, of course, no foreclosure of collateral in the present case.

*conceived after the trial.** The Court of Appeals said it did not pass upon that argument, because it did not reach it (184 F.2d at 250, first col.), since no compromise was involved: "the acquisition of this stock was [not] part of the compromise or settlement of a claim", saying that it "must look at the essential nature of the transaction and not play upon phrases" (p. 256).

Later, in *Sawyer v. Dollar,* 190 F.2d 623, the court again addressed itself to the subject and said (p. 643):

> "* * * two views are possible: (1) That Congress considered the acquisition of the shares by the Commission just as this court eventually held it to be; i.e., an acquisition by way of pledge for security of a loan. * * * (2) That Congress intended to make one single exception to its general legislation concerning the financial control of corporations of which the United States is part owner. It is inconceivable to us either that Congress intended to make one single exception to its policy and program on this subject or that, if it intended to make such an exception, it would not say so."

SUMMARY OF WHAT THE COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA HAS HELD

The Court of Appeals for the District of Columbia has held, point-blank, that the Commission had no power to acquire outright title under any theory.

In its opinion of July 17, 1950 (184 F.2d 245) it categorically rejected, with one exception, every argument advanced by the Department of Justice relative to power. The one exception was the argument that the Commission had power to compromise debts. It did not rule on that argument at that time because, as it said, the transaction of 1938 simply could not be described as a compromise.

But in two later opinions in the cause, in January 1951 and May 1951, it rejected *any and all arguments* that the Commission had the power to acquire the stock outright. On January 31st it

*There is not the faintest mention of it in the government's briefs in the Court of Appeals or in the Supreme Court in the appeal culminating in the decisions in 154 F.2d 307 and 330 U.S. 731.

said that "the Commission had no power to acquire outright ownership."

B. The Commission Lacked the Necessary Power.

In view of the decisions of the Court of Appeals of the District of Columbia, we direct our discussion to the contention that the Commission had power to acquire ownership of the stock as part of a "compromise".*

1. STATEMENT OF PRELIMINARY PRINCIPLES.

(a) He Who Asserts the Power Must Point to Specific Statutory Authority. What Is Not Specifically Granted Is Prohibited.

No governmental agency may take any action except under express statutory authority or upon authority necessarily or naturally inferable from a duty imposed or authority granted. This is elementary.† Since 1861 (if not earlier) there has been an express prohibition against the acquisition of property by government agencies without authority of statute. Title 41 *U.S.C.*, Sec. 11.

In the *Teapot Dome* cases the Supreme Court emphasized that "it has long been its [Congress's] policy to prohibit the making of contracts of purchase * * * in the absence of *express* authority and adequate appropriations therefor." *Pan American Co. v. United States,* 273 U.S. 456 at 501, 502. Cf. *United States v. Tichenor,* 12 Fed. 415 (D. Ore.). And as said in *Texas & Pacific Ry. Co. v. Pottorff,* 291 U.S. 245, 253 (per Brandeis, J.), speaking of national banks:

> "The measure of their powers is the statutory grant; and powers not conferred by Congress are denied."

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*The District Court for the District of Columbia in 82 F. Supp. 919 sought to support the power by other reasoning. The Department of Justice did not seek to support that reasoning, we answered it in our briefs in the Court of Appeals, and that court in its opinion in 184 F.2d 245 agreed with us. The District Court's opinion therefore lacks authority, and because of limitation of space, we do not deal with it further.

†Thus the authority of the Postmaster General to establish post offices has been held to carry no implied authority to lease property in which the Postmaster may carry on his activities. *Chase v. United States,* 155 U.S. 489.

The Attorney General has repeatedly advised that no authority exists for a government agency to make a contract, unless it is expressly granted or an appropriation has been made to fulfill it, or unless authority is *necessarily* inferred from a duty imposed or an authority given; and that it is not sufficient that the agency regard the particular contract to be desirable.*

Within the meaning of the rule that a government agency has only such powers as are expressly granted or necessarily implied from those granted and that a "power must be given in language explicit and express, or necessarily to be implied from other powers," the word "necessary" means either "inevitably implied" or "so strong a probability of intention that an intention contrary to that * * * cannot be supposed." *Citizens Street Railway v. Detroit Railway,* 171 U.S. 48, 53, 54.

(b) Concededly There Was No Express Grant to the Commission of the Necessary Power. Unless It Can Be Tortured Out of Section 207 of the Merchant Marine Act of 1936, It Did Not Exist.

No statute confers authority on the Commission to acquire or hold shares of stock in a private corporation other than as collateral for an indebtedness.

When *Land v. Dollar* was before the Supreme Court, the Solicitor General conceded (Brief, p. 33) that "authority to acquire absolute title to the stock is not conferred on the Commission in specific language."†

The Department of Justice rests its claim of power on an implication from Section 207 of the Merchant Marine Act of

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*4 *Opinions Attorney General* 600; 9 *Opinions Attorney General* 18; 15 *Opinions Attorney General* 235; 19 *Opinions Attorney General* 650; 31 *Opinions Attorney General* 597. The intention of Congress that the power be exercised should be so clearly expressed as to amount to an express authority; otherwise the exercise of the power by an executive department is illegal (11 *Opinions Attorney General* 201).

†The Comptroller General of the United States in his Annual Report to Congress for the fiscal year ending June 30, 1940 stated that the Commission's alleged acquisition of the stock was "under doubtful authority, to say the least." (J.A. 1327, 1329)

1936 (46 U.S.C. Sec. 1117). And the Department has conceded, *"If Section 207 does not give the Commission that authority then the defendants'* [appellant's here] *case falls"* (J.A. 2067).

Section 207, as amended in 1938, provides,

> "The Commission may enter into such contracts, upon behalf of the United States, and may make such disbursements as may, in its discretion, be necessary to carry on the activities authorized by this chapter, *or to protect, preserve, or improve the collateral* held by the Commission to secure indebtedness, in the same manner that a private corporation may contract within the scope of the authority conferred by its charter. * * *"

The very face of this section demonstrates that it gave to the Commission power to make contracts and disburse funds only (1) to carry out the activities authorized by the Merchant Marine Act, and (2) to *protect, preserve or improve the collateral* held by the Commission to secure indebtedness. It conferred no power to retain property after the indebtedness for which it is collateral has been paid or to take title to property independently of foreclosure of collateral. Security remains security, it remains attached to the debt, and when the debt is paid its function has been served.

As the District of Columbia Court of Appeals said in May 1951, *Sawyer v. Dollar,* 190 F.2d 623, 644:

> "It must constantly be remembered that the United States does not say it paid anything whatever for this stock; as a matter of fact it did not. The acquisition was described in a single sentence by the Comptroller General in his 1950 report to the Congress concerning the Maritime Commission. He said:
>
> " 'The Commission acquired this stock under an agreement dated August 15, 1938, in consideration of releasing R. Stanley Dollar and the Dollar Steamship Lines (California) from all liability as makers, co-makers, guarantors, or endorsers on the mortgages on 12 ships purchased from the United States Shipping Board in 1923 and 1925.'
>
> That sentence is a clear and unmistakable description of a substitution of one sort of security (negotiable paper col-

lateral) for another (personal guaranties) upon a loan. That is what we held it to be."

The question is simply one of construing Section 207, the language of which is clear and simple; the problem is merely "to read English intelligently".*

2. THE COMMISSION HAD NO POWER TO COMPROMISE DEBTS DUE THE UNITED STATES OR TO ACCEPT IN PAYMENT ANYTHING BUT MONEY.

The Commission no more had power to use claims of the United States to buy a steamship line than in the *Teapot Dome* cases the Secretary of the Navy could exchange oil in naval reserves for storage facilities. *Pan American Co. v. United States,* 273 U.S. 456, 501, 502; *Mammoth Oil Co. v. United States,* 275 U.S. 13, 35. There the Secretary of the Navy relied on a statute empowering him to "use, store, exchange, or sell the oil", but no statute, even similar to that, exists here.

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*In *Northern Securities Company v. United States,* 193 U.S. 197, 400, Mr. Justice Holmes said:

> "Great cases like hard cases make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment. These immediate interests exercise a kind of hydraulic pressure which makes what previously was clear seem doubtful, and before which even well settled principles of law will bend. *What we have to do in this case is to find the meaning of some not very difficult words.* We must try, I have tried, to do it with the same freedom of natural and spontaneous interpretation that one would be sure of if the same question arose upon an indictment for a similar act which excited no public attention, and was of importance only to a prisoner before the court. Furthermore, while at times judges need for their work the training of economists or statesmen, and must act in view of their foresight of consequences, *yet when their task is to interpret and apply the words of a statute, their function is academic to begin with—to read English intelligently*—and a consideration of consequences comes into play, if at all, only when the meaning of the words used is open to reasonable doubt."

(a) The Power to Compromise Claims of the United States Rests in the Secretary of the Treasury or, in Certain Circumstances, in the Attorney General.

If the Commission had the power to compromise, that power was not expressly granted and would have to be implied from some express power. The only source from which it has been sought to imply such a power is the mere fact that collection of a debt due from the old Dollar Line (now APL) and secured by the joint liability of certain of the Dollars was entrusted by law to the Commission.

But it is a settled rule of the law of agency that an agent authorized to collect or receive payment "has no implied power to release the debt, in whole or in part, or to compromise the claim, without payment in full; * * * to discharge part of the debtors * * * [or] discharge sureties" (*Mechem on Agency* (2d Ed. 1914), Sec. 955, pp. 687, 688) or to receive anything but money (*Mechem,* Sec. 946, p. 679); *Ward v. Smith,* 7 Wall. 447; *Luckehe v. First Nat. Bank,* 193 Cal. 184, 187, 223 Pac. 547.

Moreover, no power can ever be implied in the teeth of an express statute. The usual rule of agency is made doubly applicable to government agencies by the fact that federal statute has long prescribed that, unless otherwise expressly provided, debts to the United States *must* be paid in money (Rev. Stat. Sec. 3473; Title 31 U.S.C., Sec. 198)* and they must be paid *in full.*

Of course, the United States, *as such,* as an incident to its general right of sovereignty, has the power to compromise its claims and to accept something other than money in satisfaction of them (cf. *United States v. Hudson,* Fed. Cas. No. 15413, and *United States v. Lane,* Fed. Cas. No. 15559). But the powers of the United States are one thing; the powers of any particular agency are another. *Congress has not conferred the general power to compromise claims on the Commission.*

Powers of the United States can only be exercised "through the instrumentality of the proper department to which those

*In U.S.C.A., Sec. 198 is misquoted but is corrected in the pocket supplement.

powers are confided," *United States v. Tingey,* 5 Pet. (U.S.) 114 at 128. In *United States v. Lane,* wherein Tingey's case is quoted, it was said of the power to compromise claims that "The Solicitor of the Treasury is charged with this duty" (2d headnote).

And as said in *Royal Indemnity Co. v. United States,* 313 U.S. 289, 294,

> "Power to release or otherwise dispose of the rights and property of the United States is lodged in the Congress by the Constitution. * * * Subordinate officers of the United States are without that power, save only as it has been conferred upon them by Act of Congress or to be implied from other powers so granted."

And Congress has conferred this power of compromise on, and confined it to, the Secretary of the Treasury. Title 31 *U.S.C.,* Sec. 194.*

Appellant asserted below that a government official responsible for collection of a claim of the United States is authorized to compromise the debt and accept property in satisfaction thereof without specific authority, and that the power has been exercised "since the foundation of the Government." This contention is not so and is not remotely supported by the cases relied on. *United States v. Tingey,* 5 Pet. 115; *United States v. Bradley,* 10 Pet. 343; *Neilson v. Lagow,* 12 How. 98 and *United States v. Hudson,* Fed. Cas. No. 15,413. These cases hold that the United States —not any particular official or agency—can do these acts, but *they take pains to state,* as just noted, *that the powers of the United States can only be exercised "through the instrumentality of the proper department to which those powers are entrusted."*

The power which officers of the United States—as distinguished

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*"Upon a report by a district attorney, or any special attorney or agent having charge of any claim in favor of the United States, showing in detail the condition of such claim, and the terms upon which the same may be compromised, and recommending that it be compromised upon the terms so offered, and upon the recommendation of the General Counsel for the Department of the Treasury, the Secretary of the Treasury is authorized to compromise such claim accordingly. But the provisions of this section shall not apply to any claim arising under the postal laws."

from the United States—have exercised "since the foundation of the government" by implication from the power to collect claims is, as the cited cases clearly show, the power to take *security* to secure those debts for the purpose of having them paid in full according to the contract. See also *United States v. Linn,* 15 Pet. 290; *Dugan's Executor v. United States,* 3 Wheat. 172. And since the foundation of the government the courts have also consistently held that no government agency may give up what belongs to the government to acquire property, in the absence of express authority. In *Neilson v. Lagow,* supra, the Court also made it clear that the authority implied from the power to collect a debt *is strictly limited to taking security for the debt,* and it said (p. 108):

> "The object of any form of conveyance by way of security is not to acquire the dominion and ownership of land, nor even to invest funds therein, but simply to obtain payment of the debt secured. This is the principal thing to which all others are incidental."

Section 194 of Title 31 U.S.C. not only confers the power to compromise on the Secretary of the Treasury, *but it also prescribes the extent of the powers relative to compromise which may be exercised by the official having charge of the claim in favor of the United States:* His function extends no further than to render to the Secretary "a report * * * showing in detail the condition of such claim, and the terms upon which the same may be compromised, and recommending that it be compromised upon the terms so offered."

Under a similar statute prescribing how and by whom claims arising under the internal revenue laws may be compromised (Title 26, *U.S.C.,* Sec. 3761(a)), it is held that the method provided is "exclusive" and, unless followed, the compromise is not binding. *Botany Worsted Mills v. United States,* 278 U.S. 282. There the Supreme Court said (p. 289): *"When a statute limits a thing to be done in a particular mode, it includes the negative of any other mode."*

To the same effect, *George S. Colton etc. Co. v. White,* 16 F. Supp. 726 (D. Mass.). Such claims can therefore not be com-

promised without the consent of the Secretary of the Treasury. Cf. *Royal Indemnity Co. v. United States,* 313 U.S. 289, 295.

The power to compromise claims due the United States may also be exercised by the Attorney General if the controversy has been referred to him for handling.* *But no other agency has any power to compromise a debt to the United States or to accept anything other than as provided by the contract itself or payment in full* (21 *Op. Atty. Gen.* 494), except in specific instances covered by specific and express statutes.†

The authority to make a contract for the United States implies no authority to cancel it or relinquish any rights thereby acquired or to release the obligor in any part. *American Sales Corp. v. United States,* 32 F.2d 141 (5 Cir.).

(b) A Review of the Merchant Marine Act and Its Amendments from Time to Time Clearly Negatives the Power to Compromise Debts Due the United States.

No statute singled out the Maritime Commission for special treatment by conferring on it a general power to settle and compromise claims of the United States entrusted to it. On the contrary, in every instance where Congress has intended to confer on the Commission the power to adjust, settle or compromise claims for or against the Government, it has done so by an express and limited grant.

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*By virtue of Section 5 of Executive Order No. 6166 of June 10, 1933 and the Attorney General's capacity as the law officer of the government in litigation. 38 *Opinions Attorney General* 98.

†Appellant asserted below that other agencies have had a power to compromise debts, by implication. But the only alleged examples advanced were the authority of the Interstate Commerce Commission to extend the time for payment of loans to railroads under Section 210 of the Transportation Act of 1920, the power of the government of Puerto Rico to compromise liability for an offense under the Harrison Narcotic Act, and the power of the Attorney General to compromise claims in litigation. The first two examples are not cases of an implied power but of an express grant of the power. And the power of the Attorney General rests on a different basis, has long been recognized, and furnishes no analogy.

In the Merchant Marine Act of 1936 as originally enacted, Congress expressly granted the Commission power to adjust and settle claims *in one and only one instance.* Section 401 (Title 46 *U.S.C.,* Sec. 1141) of the Act having cancelled all ocean mail contracts as of June 30, 1937, Section 402(a) (46 *U.S.C.,* Sec. 1142) authorized the holder of any mail contract so terminated to file an application with the Commission "to adjust and settle all rights of the parties under such contract." Section 402(b) authorized the Commission "to attempt to adjust all differences with such contractor, including any claims of the contractor against the United States and *any claims of the United States against such contractor,* arising out of its foreign ocean mail contract."

Section 402(d) (46 *U.S.C.* Sec. 1142(d)) was added in 1938 to authorize the Commission in case suit based upon the termination or breach of the contract had been filed by the contractor in the Court of Claims prior to July 1, 1937, to settle "any claims of the contractor against the United States and any claims of the *United States against such contractor,*" arising out of said contract.

Yet *even these powers to compromise specific claims were limited and hedged.* If a settlement agreement were reached under Section 402(d), it was reviewable by the Attorney General, who had the power to carry the matter into the Court of Claims (under Section 402(b)) or to veto it in 60 days (under Sec. 402(d)). And if a settlement under Section 402(d) provided for payment of money, it had to be applied against any debt owing to the United States by the contractor. Even then, the release of the contractor was not to be given by the Commission, but "The Comptroller General of the United States shall execute a discharge of the amount of such debt satisfied."

When the Merchant Marine Act was extensively amended in 1938, there was an express grant to the Commission of the power to settle, adjust and compromise *one other specific kind of claim.* In the new Federal Ship Mortgage Insurance Title whereby the Commission was authorized to insure private mortgages, it was provided in Section 1105(d) (Title 46 *U.S.C.,* Sec. 1275(d))

that "the Commission shall also have power to pursue to final collection, by way of *compromise* or otherwise, all claims against mortgagors assigned by mortgagees to the Commission as provided in this section."

In 1940 Congress once more amended the Merchant Marine Act, and, *inter alia,* added a subtitle, "Insurance," to Title II of the Act, which authorized the Commission to provide insurance and reinsurance under stated conditions against loss due to war and marine risks. Section 226(a) (*46 U.S.C.,* Sec. 1128(e)) of the Act, as amended, provided that "The Commission in the administration of *this subtitle* is authorized to adjust and pay losses, *compromise* and settle claims whether *in favor of* or against the *government,* and to pay the amount of any judgment rendered in respect of any suit or settlement agreed upon in respect of any claim."

Clearly, both in 1938 and in 1940, Congress believed that the Commission had no general power to adjust, settle and compromise claims administered by it and found it necessary *expressly* to grant that power in respect of claims arising out of new rights and duties then created.

Moreover, Section 9 of the Suits in Admiralty Act (*46 U.S.C.,* Sec. 749) provides that the Maritime Commission (or the Secretary of any Department or the board of trustees of any government owned corporations having control of a merchant vessel) may "compromise, or settle any claim in which suit will lie" under *that* act.

Expressio unius est exclusio alterius. The express grants in 1936, 1938 and 1940 would have been unnecessary and frivolous if the Commission already possessed the power under some supposed broad grant.

(c) Whenever Power to Compromise Claims Is Conferred on Agencies Other Than the Secretary of the Treasury, It Is Closely Restricted.

A review of the statutes shows that whenever a power to compromise claims of the United States is bestowed by Congress on *any* agency other than the Secretary of the Treasury, it is not left

vagrant but is closely confined. Reference may be made to power of the Secretary of Agriculture to compromise indebtedness of farmers arising under a variety of farm loan acts (Title 12 *U.S.C.,* Sec. 1150), of the Department of Justice (formerly the general accounting office upon consent of the Postmaster General) to compromise claims of the post office (R.S. 295; Executive Order No. 6166, Sec. 5, June 10, 1933; *U.S.C.,* Title 31, Sec. 115), of the Bonneville Dam Administrator (Title 16 *U.S.C.,* Sec. 832a, 832k), and of the Secretary of the Navy (Title 34 *U.S.C.,* Sec. 600a-600c; 46 *U.S.C.,* Sec. 797, 799).

A holding that the Maritime Commission, *without express statutory grant,* has an *unlimited* power to compromise, while other agencies, with specific grants, do not, would be an extraordinary piece of statutory construction.

(d) The Commission Did Not Have the General Powers of a Private Corporation.

To reach this extraordinary construction the Department of Justice starts from a premise that Section 207 of the Merchant Marine Act conferred on the Commission all the powers of a private corporation. That premise is wholly untenable.

Section 207 does not confer on the Commission the substantive powers of private corporations. It merely specifies the *manner* in which the powers that are conferred on the Commission by the other sections of the law may be exercised. Just as a private corporation can only act "within the scope of the authority conferred by its charter," so the Commission could act only within the limits of the authority granted by the other sections of the Act. So long as it confined itself to those "activities" so authorized, it was given freedom in the *manner* of performing those "activities."

If an express power to do an act could *elsewhere be found,* that power could be exercised in the *manner* of a corporation. But the provision in Section 207 as to corporations does not itself create a power not otherwise expressly conferred.

(e) Even if the Commission Did Have the General Powers of a Private Corporation, Still It Had No Power to Acquire Absolute Title to the Stock Here.

Even private corporations are limited by their charters. Where the charter contains numerous express but limited grants, a broader power may not be implied. As said in *Central Transp. Co. v. Pullman's Car Co.,* 139 U.S. 24, 48:

> "The charter of a corporation, read in the light of any general laws which are applicable, is the measure of its powers, and the enumeration of its powers implies the exclusion of all others not fairly incidental."

Congress has created actual corporations for public purposes, but they are still government agencies (*Cherry Cotton Mills v. United States,* 327 U.S. 536, 539), restricted to the authority granted to them (*Federal Crop Ins. Corp. v. Merrill,* 332 U.S. 380, 384), and the fact that they operate in corporate guise does not give them power to compromise claims. Thus it has been held that regional agricultural credit corporations could not compromise claims (*Regional Agricultural Credit Corporation of Minneapolis v. Stewart,* 289 N.W. 801, 69 N.D. 694), and under the present law the power to compromise claims of the Commodity Credit Corporation and the Federal Crop Insurance Corporation lies in the Secretary of Agriculture (*U.S.C.,* Title 12, Secs. 1150-1150(a)).

Had Congress actually created a private corporation to administer the Merchant Marine Act of 1936, that corporation would be limited by the powers conferred on it. And if it were entrusted with the collection or supervision of debts due the United States, it could not compromise them unless express authority were granted to it.

Appellant's argument below rested on the premise that private corporation has broad power to settle or compromise *its* claims. But a corporation's implied power to compromise debts is confined to claims *belonging to it.* If it is merely an agent to superintend and collect claims of another, particularly of the Government, the fact that it happens to be a corporation gives it no

right to give them up for something different than called for by the contract. That fact that an agent is corporate does not broaden its authority.

(f) The Debts to the United States Were Not Created by the Commission's Activities but Were Entrusted to It by Law Only for Supervision and Collection.

The debts to the United States which appellant claims were compromised arose before the Commission's creation, out of contracts entered into with the old Shipping Board (184 F.2d 245, 250), which called for the payment of the debt in money, evidenced by promissory notes.

These debts passed into the Commission's possession under the provisions of Section 202 of the Merchant Marine Act (*46 U.S.C.*, Sec. 1112), which provided that "all money, notes, bonds, mortgages, and securities of every kind, contracts and contract rights, lands, vessels, docks, wharves, piers and property and interests of every kind, owned by the United States" and controlled by the Department of Commerce as the successor of the United States Shipping Board, were transferred to the Maritime Commission.

The Commission was therefore a "conservator" or "receiver" of these debts. Section 206 (*46 U.S.C.* Sec. 1116) of the Act provided that "the *proceeds* of all debts, accounts, choses in action, and the proceeds of all notes, mortgages, and other evidences of indebtedness, hereby transferred to the Commission * * * shall be deposited in the Treasury of the United States."

The government has always asserted that this section, in its reference to "proceeds", meant money. It follows that the Commission was expressly confined to accepting money in payment of debts coming to it from the Board.

And the conclusion follows also from the general rule that once a contract is made, no government agency may modify it without express authority, *American Sales Corporation v. United States,* 32 F.2d 141 (5 Cir.); *Bayboro Marine Ways Co. v. United States,* 72 F. Supp. 728, other than the Secretary of the Treasury

as part of a compromise. It took the "First War Powers Act" of 1941 to grant the power to modify existing contracts (55 Stat. 838, Title II, Section 201).

Regardless of what power the Commission might have had to accept something other than money in settlement of debts created by its own transactions, it had no such power with respect to debts coming to it as "liquidator" of the old Shipping Board.

This is confirmed by still other provisions in the very section (Sec. 202) under which the debts passed to the Commission. That section further provides:

> "Notwithstanding any other provision of law, the Commission may, in accordance with good business methods and on such terms and conditions as it determines to effectuate the policy of this chapter, *operate* or *lease* any *lands, docks, wharves, piers,* or *real property* under its control, and all money received from such operation or lease shall be available for expenditure by the Commission as provided in this chapter" (46 U.S.C. Sec. 1112).

If the Commission had the limitless power which the government's arguments postulate, this provision neither was necessary nor added to the Commission's powers. But Congress had no such understanding of the law, and therefore it *specifically* granted to the Commission the express power to make *certain specific types of disposition of certain specific types of property* coming from the Shipping Board.

The absence of a power to compromise is also shown by the fact that in 1938 Section 202 (46 U.S.C., Sec. 1112) was amended to empower the Commission to "make such extensions and accept such renewals of the notes and other evidences of indebtedness hereby transferred, and of the mortgages and other contracts securing the same, as it may deem necessary to carry out the objects of this chapter." This empowered the Commission *to extend and renew notes* which came to the Commission from the Shipping Board. In the absence of this amendment the Commission would have had no such power.

Is it not fantastic to argue that while the Commission had no power to compromise by merely extending time of payment even for one day—absent this express grant of 1938—it did have the power to compromise by giving up the debt entirely for anything it saw fit to accept!

Congress specifically empowered the Commission to sell or charter vessels transferred to it from the Shipping Board (Act, Section 904; 46 *U.S.C.,* Sec. 1243). And Section 508 (46 *U.S.C.,* Sec. 1158) specifically provided that the Commission could scrap or sell vessels transferred to it under Section 202 above, under certain conditions and with certain qualifications.

Under the maximum *expressio unius est exclusio alterius,* no such power to make disposition of other types of property, such as notes or mortgages, existed, certainly no power to use such notes and mortgages to acquire corporate stock.

(g) The Whole Structure of the Merchant Marine Act of 1936 Demonstrates That the Commission Was an Administrative Agency of Limited and Specified Powers.

The Act as a whole demonstrates that the Commission was an administrative agency with limited and specified powers. Congress specified the Commission's powers in painstaking detail. Time and time again, in the original Act, in amendments to it enacted in the 15 years thereafter, and in other legislation not amendatory of the Act, Congress, believing it necessary to express itself specifically, conferred upon the Commission a variety of precise and delimited powers, all of which would have been unneeded if the Commission already had the broad and unlimited grant of authority which the government claims.

To say that outright ownership is acquired by compromise does not alter the nature of the transaction. It would still be in legal effect a sale and purchase, for any transfer of ownership for a consideration, whatever the consideration, is a sale and purchase. The *Uniform Sales Act* provides that "A contract to sell * * * is a contract whereby the seller agrees to transfer the property

* * * to the buyer for a consideration called the price" (Sec. 1; *Cal. Civ. Code,* Sec. 1721), and that "The price may be made payable *in any personal property*" (Sec. 9(2); *Cal. Civ. Code,* Sec. 1729(2)). And see definition of "value" (Sec. 76; *Cal. Civil Code,* Sec. 1796). Prior to 1938 that Act had been adopted in 36 states, including California and the District of Columbia.

If the Commission released claims of the United States against R. Stanley Dollar and Dollar Steamship Line as the purchase price of stock, it not only purported to acquire property but also to dispose of rights of the United States. But whenever Congress has desired to confer on the Commission power to *acquire* outright title to property, it has said so specifically, with detailed prescriptions of terms, manner of exercise and limitations. The same is true wherever Congress desired to confer power on the Commission to dispose of property or rights of the United States.

In the Appendix to this brief we set out a whole series of statutes demonstrating these facts.

If the power to compromise were identical with the power to exchange, note the consequences. The Department of Justice would squeeze a power to compromise out of the mere fact that a government agency is entrusted with debts to collect for the United States. Under the argument every agency having debts to administer could trade at will with these debts and buy any kind of property for the government.

(h) The Commission Derived No Power to Compromise from the Old Shipping Board, Because That Board Had No Such Power.

In the court below appellant sought to base the alleged power on the fact that the Commission succeeded to the powers and duties of the old Shipping Board. But the old Board had no power to compromise debts due the United States. Appellant's argument was based on a suave assumption that the Shipping Board had the powers of the United States Shipping Board Emer-

gency Fleet Corporation. But the Fleet Corporation was an entity quite distinct from the Board.

The old Fleet Corporation *was* a private corporation, organized under the laws of the District of Columbia under the authority of the Shipping Act of 1916 (39 Stat. 728, c. 451). Section 11 of that Act expressly authorized creation of a corporation for certain purposes and for a limited period of time. *United States ex rel Skinner & Eddy Corporation v. McCarl, Comptroller General,* 275 U.S. 1, states that the Fleet Corporation was "an entity distinct from the United States *and from any of its departments or boards*" (p. 11); it was for that reason that "audit and control of *its* financial transactions" was committed "under general rules of law" to its own corporate officers.

The Board did not have any such powers. No case either holds or remotely suggests that it did.

When the Shipping Board was terminated by statute, its powers were given to the Maritime Commission, *but the powers of the Emergency Fleet Corporation were not.* This is evident from a comparison of the successive Sections 202, 203 and 204 of the Merchant Marine Act of 1936 (Title 46 U.S.C., Sec. 1112, 1113, 1114).

Section 202 provided that all moneys and properties of the Shipping Board should be transferred to the Maritime Commission. Section 203, dissolving the Fleet Corporation, made similar provisions regarding its property. And while Section 204 prescribed that "all of the functions, powers and duties vested in the former United States Shipping *Board*" should be transferred to the Maritime Commission, there is no section or provision whatever that the powers and duties of the Fleet *Corporation* should be so transferred.

Thus the Act did three things: (1) It transferred to the Commission the *property* of the *Shipping Board;* (2) it transferred to the Commission the *powers* of the *Shipping Board;* (3) it transferred to the Commission the *property* of the *Fleet Corpora-*

tion. But it did *not* transfer to the Commission the *powers* of the Fleet Corporation.*

(i) The Commission Derived No Power to Compromise from Its Relative Freedom from Control of the General Acounting Office.

Another argument was that the Commission was given the same freedom from the control of the Comptroller General as had been possessed by the Fleet Corporation. *But the Comptroller General has never had any power to compromise debts due to the United States.* Conseqeuntly, freedom from his control relates to a wholly different subject.

The source of the Comptroller General's power is Title 31 *U.S.C.,* Section 71, which reads:

> "All claims and demands whatever by the Government of the United States or against it, and all accounts whatever in which the Government of the United States is concerned, either as debtor or creditor, shall be settled and adjusted in the General Accounting Office."

But this section pertains merely to accounting and auditing. By "settling and adjusting" claims and accounts it means merely the computation and determination of the fact and amount of the claim and not a compromise thereof. It is so held in *United States v. St. Louis Clay Products Co.,* 68 F. Supp. 902, which reviews the authorities.

As we have seen (p. 105, supra), Section 194 of the same Title 31 assigns the power to compromise to the Secretary of the Treas-

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*The Department of Justice is fully aware of the distinction, for in their brief on the merits in the Court of Appeals for the District of Columbia, they said (pp. 101, 102):

> "It is significant that Congress, by the Merchant Marine Act, 1936, transferred to the Commission 'All the functions, powers and duties vested in the former United States Shipping Board' by the several earlier shipping acts (46 U.S.C. 1114) and that the *Shipping Board was not organized as a corporation* and was not given by Congress power to sue and be sued. *By contrast, the powers of the Merchant Fleet Corporation, which was organized as a District of Columbia Corporation,* and which had the power to sue and be sued *were not so expressly transferred to the Commission.*"

ury. Section 71 was enacted in 1817. Until 1921 the words "Treasury Department" appeared where the words "General Accounting Office" now appear. Section 194 was enacted in 1863. Save for the addition of the last sentence excluding claims under the postal laws and the substitution of the words "General Counsel for the Department of the Treasury" for "Solicitor of the Treasury," it has never been changed. *Thus for 56 years both of these sections conferred their powers on the Treasury Department.* Section 71 conferred its powers on what was the "accounting branch" of the Treasury Department. But Section 194, since it conferred a power of greater responsibility, that of compromising claims, conferred it solely on the head of the Department, the Secretary himself.

These two sections did not duplicate each other. The first pertains to accounting or auditing, the ascertaining of claims or accounts, their amounts and propriety. The second pertains to the compromise of debts. If the power to compromise was covered by Section 71, then Section 194 would have been a superfluity.*

When the General Accounting Office was created the powers of Section 71 were transferred from the Treasury to the General Accounting Office.† The other powers of the Treasury, including the power to compromise debts, were not so transferred.

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*The titles to the acts from which they were derived point to the same conclusion. The Act of 1817 (3 Stat. 366, c. 45, Sec. 2), the original of Section 71, is entitled "An act to provide for the prompt settlement of public accounts." The other (12 Stat. 740, c. 76, Sec. 10) was entitled "An act to prevent and punish frauds upon the revenue, to provide for the more certain and speedy collection of claims in favor of the United States, and for other purposes." As they now appear in the U. S. Code, Section 71 is in Chapter 2 entitled "Audit and Settlement of Accounts," and Section 194 is in Chapter 6 entitled "Debts Due By, Or To, the United States."

†In *United States ex rel. Skinner & Eddy Corporation v. McCarl, Comptroller General,* 275 U.S. 1 at 4, in footnote 2, the court reviews the growth of the "accounting branch of the Treasury," whose powers were those transferred to the General Accounting Office. In *Globe Indemnity Co. v. United States,* 291 U.S. 476, it is pointed out that the function of the General Accounting Office in auditing and settling claims is the same as that formerly exercised by the Accounting Office of the Treasury Department.

Since the General Accounting Office would have had no power to enter into compromise, the alleged freedom of the Maritime Commission from control of the General Accounting Office is irrelevant.*

3. AS A MATTER OF LAW, THE TRANSACTION OF 1938 COULD NOT POSSIBLY BE CALLED A COMPROMISE.

Moreover, the argument about power to compromise is irrelevant because the transaction could not conceivably be called a compromise, as the District of Columbia Court of Appeals so held.

If it were a "compromise," what claims were here compromised? The contention is that the Commission compromised debts due the United States by taking stock in satisfaction instead of money. There was a debt of $7,500,000 from the company (Dollar of Delaware, now called American President Lines). But *that* debt was not compromised. The contract provided (para. 14) that not one farthing of credit should be allowed on that debt as a result of the transfers (R. 26). And as noted in *Dollar v. Land,* 184 F.2d 245, "No part of the debt was released" (p. 250, first col.; and see 2d col.; also p. 252, 2d col. and 254, first col.).

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*Appellant below invoked a portion of Section 207 of the Merchant Marine Act of 1936, viz.:

> "All the Commission's financial transactions shall be *audited* in the General Accounting office according to approved commercial practice as provided in the Act of March 20, 1922, ch. 104, 42 Stat. 444: Provided, that it shall be recognized that, because of the business activities authorized by this chapter, the Accounting Officers shall allow credit for all *expenditures* shown to be necessary because of the nature of such authorized activities, notwithstanding any existing statutory provision to the contrary." (46 U.S.C. Sec. 1117).

Patently this proviso is merely a limitation on the requirement of *auditing* in the General Accounting Office, a requirement which has nothing to do with compromise of debts. Moreover, it relates, not to debts *due* to the United States, but to *expenditures of money* by the Commission.

Appellant below quoted from Reports of Congressional Committees on the 1938 amendment to Section 207. But the reports merely referred to the power of the Comptroller General to disallow *payments by the Commission* or to disallow items "in the accounts of the disbursing officer in connection with *disbursements for the Commission.*"

It is next claimed that what was compromised were debts due from the transferors of the stock. But the transferors were R. Stanley Dollar, H. M. Lorber, Dollar Steamship Line (i.e., Dollar of California), Admiral Oriental Line, Mortimer Fleishhacker, and the Estate of J. Harold Dollar (R. 18-20). *And Lorber, Admiral Oriental Line, Mortimer Fleishhacker and the Estate of J. Harold Dollar were never indebted to the United States.* So stated, 184 F.2d 245, at 253, first col. As a pledge to protect the corporation in which they owned stock to give it time to get on its feet, the transaction makes sense. As a compromise it makes no sense because they had no debts to compromise.

As to R. Stanley Dollar and Dollar of California, they were merely sureties and joint debtors with Dollar of Delaware for a portion of the $7,500,000 debt of Dollar of Delaware (184 F.2d 245, at 250 (first col.)). Mr. Dollar was jointly and severally liable with Dollar of Delaware for about ¼ of the debt, and Dollar of California was jointly and severally liable with Dollar of Delaware for about ½ the debt (184 F.2d at 250, 2d col.). Their obligations were not different debts from that of Dollar of Delaware. There was but one single debt, for portions of which Mr. Dollar and Dollar of California were liable, but collaterally only, in a surety capacity. Yet, as we have seen, the agreement provided that no credit was allowed thereon.

Moreover, none of the conditions necessary to a compromise were present. Not even the Secretary of the Treasury could have validly discharged R. Stanley Dollar or Dollar Steamship Line of their liability in consideration for outright transfer of ownership of the stock, under guise of a compromise. The power conferred by Title 31 *U.S.C.*, Sec. 194 is the power to "compromise." The word "compromise" relates to the settlement of claims of doubtful recovery. 36 Op. Atty. Gen. 40 (1929). Therefore, it is held that the power to compromise, i.e., to accept something other than called for by the contract, can be exercised only if (a) the claim is of doubtful validity, or (b) if there is doubt of its collectibility in case a judgment is rendered. In 38 Op. Atty. Gen.

94 (1934) this subject is clearly reviewed historically and analytically.

These requirements repeatedly stated by the Attorney General are inherent in the very concept of compromise. A compromise can only be made where there is a controversy or a dispute which is the subject of the compromise. *Cannavina v. Poston,* 124 Pac. 2d 787, 793 (Wash. 1942).

None of these essential conditions existed in the present case. There never was a dispute as to the existence of the collateral promises of Mr. Dollar and Dollar of California securing the debt, or their enforceability. The validity of the notes signed by these two and their liability thereunder were never questioned. The amount of these notes was in fixed sums and undisputed (J.A. 294-296, 350, 351). Nor was any element of doubtful collectibility present. Since the debt was secured by mortgages on ships (J.A. 296), the liability would actually only be for a deficiency judgment, if there should be one, after foreclosure of the ship mortgages and application of the proceeds on the debt. The mortgaged ships were worth vastly more than the debt (J.A. 1310, 1311, 1233-1235, 1236, 1242, 1264, 1265). This fact has always been conceded.*

The transaction of August 15, 1938 was upon its face simply an exchange of collateral promises for shares of stock substituted therefor. The parties have disputed whether the exchange resulted in an outright transfer of ownership or, as the Court of Appeals held, a substitution of security. But whether (apart from the question of the Commission's legal power to take ownership) it was sale or pledge, it *could not be* a compromise. So the Court of Appeals held. In *Cannavina v. Poston,* 124 Pac.2d 787, 793, the court held that an offer to discharge a liability by a transfer of property could not be treated as a compromise. And so the

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*Although the government has argued that there would have been no common stock equity after payment of the secured debt plus all other debts plus all preferred stock, it has always been conceded that the ships were worth far more than the debt to the United States which they secured.

power to acquire ownership could not be evolved from an alleged power to compromise. And no other basis exists.

CONCLUSION

We respectfully submit that the judgment is right on each of the three main grounds discussed in this brief, and that it should be affirmed.

Dated: San Francisco, March 11, 1952.

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Appendix

WHENEVER CONGRESS WISHED TO CONFER ON THE COMMISSION POWER TO ACQUIRE TITLE TO PROPERTY OR TO DISPOSE OF PROPERTY OR THE RIGHTS OF THE UNITED STATES, IT SPECIFICALLY SO PROVIDED, WITH DETAILED LIMITATIONS AND PRESCRIPTIONS.

Congress always followed the procedure stated in the caption, not only in the Merchant Marine Act of 1936 but in subsequent amendments and in other legislation.

1. Re Power to Acquire Title.

For example, by Section 507 of the Act (46 *U.S.C.,* Sec. 1157) Congress specifically conferred on the Commission the power to purchase from ship operators obsolete and inadequate vessels, at a fair and reasonable valuation which was to be credited on the sale price of new vessels to be constructed under a construction subsidy and sold to the ship operator.

In 1938 Congress added Section 215 to the Merchant Marine Act (Title 46 *U.S.C.,* Sec. 1125) authorizing the Commission to acquire ships in certain circumstances. At the same time it amended Section 207 to add the words "or to protect, preserve, or improve the collateral held by the Commission to secure indebtedness".

Also in 1938 Congress added the "federal ship mortgage insurance" title (46 *U.S.C.,* Sec. 1271, et seq.), by which it authorized the Commission to provide ship mortgage insurance to private mortgagees. If private mortgagees acquired the mortgaged property by foreclosure or otherwise, Section 1105(a) (46 *U.S.C.,* Sec. 1275(a)) authorized the Commission to buy it from the mortgagees, together with their claims against the mortgagor by foreclosure or otherwise, payment to be made in debentures.

Section 902 of the Act (46 *U.S.C.,* Sec. 1242) authorized the Commission to requisition vessels "during any national emergency" declared by the President, and in 1939 this was amended to authorize the Commission to purchase vessels "whenever the

President shall proclaim that the security of the national defense makes it advisable" but the manner of the exercise of the power was carefully prescribed (53 Stat. 1255).

In 1941 the Commission was relieved of the necessity of advertising or having competitive bids in cases where it was otherwise authorized to acquire ships, "whenever deemed by the President * * * to be in the best interests of the national commerce and defense during the national emergency," and other authority was granted but delimited and bounded (55 Stat. 148).

In the same year, Congress authorized the Commission to purchase vessels free of requirements of previous advertising, whenever empowered to charter them during the national emergency where essential to the national defense (55 Stat. 242).

So late as 1946, in empowering the Commission to sell war-built vessels, Congress authorized the Commission to acquire certain kinds of ships in exchange for an allowance of a credit on the purchase from it of war-built vessels (60 Stat. 41, Sec. 8).

2. Re Power to Dispose of Property or Rights.

The original Act empowered the Commission to scrap or sell vessels not worth preservation (Sec. 508) (46 *U.S.C.,* Sec. 1158), and to charter vessels (Sec. 704, 714; 46 *U.S.C.,* Sec. 1194, 1204). The Federal Ship Mortgage Insurance title of 1938 empowered the Commission to sell properties acquired under that title (Sec. 1105(d), 46 *U.S.C.,* Sec. 1275(d)). In 1939 the Commission was empowered to transfer to other agencies of the government upon terms approved by the President vessels requisitioned under Section 902 of the Act (46 *U.S.C.,* Sec. 1242). In 1938 (52 Stat. 833, C. 557) it was empowered to sell or lease specific real property on stipulated terms and conditions. In 1940 (54 Stat. 216, C. 201) it was empowered to sell, upon competitive bids and after advertisement, vessels transferred to it by the Act in 1936 or thereafter acquired, until revocation of the proclamation of national emergency. In 1946 (60 Stat. 138, C. 243, Sec. 309(d)) it was empowered to sell small vessels for use in the Philippine fishing industry. In the same year (60 Stat. 41, C. 82,

Secs. 4 and 6) it was empowered to sell war-built vessels owned by the United States in specified circumstances and on stated conditions.

In addition to the large number of specific grants of power which we have already mentioned in this brief, and which would have been unnecessary had Congress intended to give the Commission general powers of a private corporation, an inspection of the statutes will disclose some 20 other specific powers in the original Merchant Marine Act of 1936, possibly 20 other powers conferred by amendments of 1938, 1939, 1940, 1942, 1943, 1944, and over 16 other powers in legislation enacted in 1940, 1941, and 1946, not cast in the form of amendments to the Act.*

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*E.g., 54 Stat. 306, C. 327; 54 Stat. 1092, C. 838; 55 Stat. 5, C. 5; 55 Stat. 242, C. 174; 60 Stat. 41, C. 82; 60 Stat. 884, C. 785; 60 Stat. 961, C. 928; 61 Stat. 6, C. 6; 61 Stat. 10, C. 12; 61 Stat. 401, C. 290; 62 Stat. 172, C. 191.